APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 98-35819, 98-35820 and 98-35822.

MCI TELECOMMUNICATIONS CORPORATION, a Delaware corporation; MCI Metro Access Transmission Services, Inc.,

Plaintiffs-Appellants,

v.

U S WEST COMMUNICATIONS, a Colorado corporation; The Washington Utilities and Transportation Commission (WUTC); Anne Levinson, Chair; Richard Hemstad; William P. Gillis, in their official capacities as Commissioners of WUTC,

Defendants-Appellees.

MCI Telecommunications Corporation, a Delaware corporation; MCI Metro Access Transmission Services, Inc.,

Plaintiffs,

v.

U S West Communications, a Colorado corporation;

Defendant-Appellant,

The Washington Utilities and Transportation Commission (WUTC); Anne Levinson, Chair; Richard Hemstad; William P. Gillis, in their official capacities as Commissioners of WUTC,

Defendants-Appellees.

MCI Telecommunications Corporation, a Delaware corporation; MCI Metro Access Transmission Services, Inc.,

Plaintiffs-Appellees,

v.

U S West Communications, a Colorado corporation; Anne Levinson, Chair; Richard Hemstad; William P. Gillis, in their official capacities as Commissioners of WUTC,

Defendants,

and

The Washington Utilities and Transportation Commission (WUTC),

Defendant-Appellant.

Argued and Submitted Oct. 7, 1999

Filed March 2, 2000

Before: GOODWIN, SCHROEDER, and GRABER, Circuit Judges

SCHROEDER, Circuit Judge:

INTRODUCTION AND STATUTORY BACKGROUND

This is an appeal by U S West Communications, Inc. ("U S West") and a cross-appeal by MCI Telecommunications Corporation ("MCI") from a district court judgment entered after review of a Washington Utilities and Transportation Commission ("WUTC") decision. The WUTC decision approved an agreement between U S West and MCImetro Access Transmission Services, Inc.

("MCImetro"), an MCI affiliate, under the Telecommunicaitons Act of 1996 ("the Act"), codified in part at 47 U.S.C. §§ 251-61. The agreement sets forth the terms under which MCImetro may interconnect with U S West, the former state regulated monopolist, in order to operate as a competing local telecommunications provider in the Seattle/Bellevue area.

The Act calls upon federal courts to hear challenges to interconnection agreements developed and approved through state administrative proceedings. Review in federal court is limited to the determination of whether the agreement "meets the requirements of" the Act. 47 U.S.C. § 252(e)(6). In this case, we are asked to decide whether a number of provisions in the agreement between U S West and MCImetro violate the act.

This court has recently had occasion to decide several cases under the Telecommunications Act, and we then described the overall operation of the Act at greater length. See Pacific Bell v. Cook Telecom, Inc., 197 F.3d 1236, 1999 WL 1249707 (9th Cir. Dec. 27, 1999); U S West Communications v. MFS Intelenet, Inc., 193 F.3d 1112 (9th Cir. 1999). One of the Act's principal ingredients is a regulatory framework for promoting competition in local telephone service. The Act prohibits state sanctioned monopolies, which previously governed the field. It contains various provisions aimed at facilitating entry by potential competitors. Ironically for a statute intended to promote competition, the Act creates two levels of regulatory control. The Federal Communications Commission is charged with the responsibility of promulgating regulations necessary to implement the Act itself, but the Act reserves to states the ability to impose additional requirements so long as the requirements are consistent with the Act and "further competition." See 47 U.S.C. § 251(d).

The Act labels all former local-phone service monopolists Incumbent Local Exchange Carriers ("ILECs").

In this case the ILEC is U S West. The new competitors are called Competing Local Exchange Carriers ("CLECs"). The CLEC in this case is MCImetro.

Section 251 of the Act imposes several direct requirements on an ILEC faced with potential competitive entry by a CLEC. It is of particular relevance to this appeal that ILECs must make key "network elements" available to CLECs on an "unbundled" basis at rates that are reasonable and non-discriminatory. See 47 U.S.C. § 251(c)(3). The Act defines a "network element" as follows: "a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." 47 U.S.C. § 153(29).

The FCC by regulation lists certain network elements that must be made available by the ILECs. See 47 C.F.R. § 51.319. In deciding which network elements are subject to unbundled access, Congress has instructed the FCC to consider "whether (A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2).

The Act does not, however, attempt to provide all the terms upon which ILECs must transact with CLECs. Rather, section 252 of the Act permits carriers to contract independently for interconnection and the provision of goods and services. The reward for reaching an independent agreement is exemption from the substantive requirements of subsections 251(b) and 251(c). See 47 U.S.C. § 252(a)(1). If the carriers do not reach an independent agreement within a

specified period, the parties may petition the state agency responsible for regulating local telecommunications to arbitrate the open issues. If arbitration comes into play, then the resulting agreement must comply with section 251 of the Act and any FCC regulations promulgated under that section. See 47 U.S.C. § 252(c)(1). All interconnection agreements, whether reached independently or through arbitration, must be approved by the state agency (in this case, the WUTC). See 47 U.S.C. § 252(E)(1). The state agency may refuse to approve an independently negotiated agreement only if (1) the agreement or a provision thereof discriminates against a carrier not a party to the agreement, or (2) the agency finds that implementing the agreement or a provision thereof would be inconsistent with the public interest, convenience, and necessity. See 47 U.S.C. § 252(e)(2)(A). The state agency may refuse to approve an arbitrated agreement only if the agreement or a provision thereof fails to meet the requirements of section 251 of the Act or the FCC regulations promulgated under the Act. See 47 U.S.C. § 252(e)(2)(B).

Finally, the Act permits any party "aggrieved" by a determination made by a state agency under section 252 to "bring an action in an appropriate Federal district court to determine whether the agreement ... meets the requirements of section 251 of this title and this section." 47 U.S.C. § 252(e)(6). This language makes clear that review in federal court is restricted to the determination of whether the terms of the agreement violate any of the Act's requirements. This limited task is not always an easy one, however. "It would be a gross understatement to say that the Telecommunications Act of 1996 is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction." AT & T v. Iowa Utils. Bd., 525 U.S. 366, 119 S.Ct. 721, 738, 142 L.Ed.2d 835 (1999).

We have jurisdiction of appeals from final judgments in these actions under 28 U.S.C. § 1291. Our review is de

novo. See MFS Intelenet, 193 F. 3d at 1117. To the extent that the statute requires factual findings to support the state agency's determination, those findings are reviewed for substantial evidence. GTE South, Inc. v. Morrison, 199 F.3d 733, 745-46 (4th Cir. 1999).

HISTORY OF THIS AGREEMENT AND THE EIGHTH CIRCUIT LITIGATION

The FCC promulgated its initial regulations under the Act in 1996. Under the Hobbs Act, the Federal Courts of Appeals have exclusive jurisdiction over challenges to FCC regulations. See 28 U.S.C. § 2342; 47 U.S.C. § 402(a). Several parties filed petitions for review of the FCC regulations in several different circuits. When agency regulations are challenged in more than one court of appeals, 28 U. S. C. § 2112 requires that the panel on multidistrict litigation consolidate the petitions and assign them to a single circuit. The panel assigned the challenges to the FCC regulations to the Eighth Circuit, which thereby became, and remains, "the sole forum for addressing . . . the validity of the FCC's rules." GTE South, 199 F.3d at 743. Therefore, the subsequent history of the Eighth Circuit litigation, Iowa Utilities Board v. FCC, has punctuated the history of this agreement and litigation.

On March 26, 1996, MCImetro requested interconnection negotiations with U S West. On August 30, when the parties could not come to agreement on a number of issues, MCImetro petitioned for arbitration before a WUTC arbitrator.

On October 15, 1996, approximately a month before the WUTC arbitrator was to hold a hearing on the interconnection agreement between MCImetro and U.S. West, the Eighth Circuit stayed the effectiveness of several FCC rules on the ground that the FCC may have not had jurisdiction to issue them. Thus, when the WUTC arbitrator held the hearing in late November and issued his report in

December of 1996, some of the rules had been stayed, but no decision on the merits had been issued. On July 18, 1997, after the parties in this case had completed the arbitration and mediation process, the Eighth Circuit issued a decision on the merits. See Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir.1997). The Eighth Circuit vacated all of the rules that it had previously stayed, along with several others. On that very day, MCImetro and U S West filed with the WUTC their final statements of position as to the remaining terms in dispute.

Because a state agency has only 30 days to approve an arbitrated agreement, the WUTC entered its order approving the agreement between MCImetro and U S West and modifying the arbitrator's recommendations in some respects on August 18, 1997. The WUTC said it had not had sufficient time to consider the Eighth Circuit's decision and therefore did not address its effect on the agreement.

In September 1997, U S West and MCImetro each filed suit in the Western District of Washington seeking review of WUTC's approval and modification of the agreement. The district court issued its decision on July 22, 1998, while the Eighth Circuit's decision in Iowa Utilities Board was still in effect. Relying on that decision, the district court struck some provisions from the agreement, reasoning that as a result of the Eighth Circuit's rulings the provisions no longer met the requirements of the Act.

Both parties promptly appealed the district court's decision to this court. While this appeal was being briefed, the Supreme Court granted certiorari in Iowa Utilities Board and handed down its decision. See AT & T v. Iowa Utils. Bd. The Supreme Court reversed the Eighth Circuit in many respects, and reinstated all but one of the previously vacated regulations. We asked for supplemental briefing on the Supreme Court's decision.

We now turn to the substance of the appeal.

PROVISION PROHIBITING U S WEST FROM SEPARATING ALREADY COMBINED NETWORK ELEMENTS

As approved by the WUTC, the agreement contained a provision requiring U S West to refrain from separating already combined network elements before providing them to MCImetro. FCC Rule 315(b) was in effect when the agreement was arbitrated and mandated such a provision. The Eighth Circuit's Iowa Utilities Board decision invalidated Rule 315(b), concluding that it was inconsistent with the meaning of the Act. See Iowa Utils. Bd., 120 F.3d at 813. The district court in this case held that under the Eighth Circuit's reasoning, the presence of the provision in the agreement could no longer be said to meet the requirements of the Act. The district court accordingly struck the provision from the agreement. The Supreme Court has since reversed the Eighth Circuit and reinstated Rule 315(b). See Iowa Utils. Bd., 119 S.Ct. at 737. We must therefore reverse the district court and order the provision restored to the agreement.

COMBINING SEPARATE NETWORK ELEMENTS AT MCIMETRO'S REQUEST

In addition to requiring that U S West refrain from separating already combined network elements, the agreement requires U S West to combine otherwise separate elements upon MClmetro's request. This provision was mandated by FCC Rules 315(c)-(f) at the time of arbitration. The Eighth Circuit invalidated Rules 315(c)-(f) using the same rationale it employed to invalidate Rule 315(b). That is, the Eighth Circuit concluded that requiring combination was inconsistent with the meaning of the Act because the Act calls for "unbundled" access. See Iowa Utils. Bd., 120 F.3d at 813. The district court once again followed the Eighth Circuit's reasoning and struck the combination provision from the agreement.

Unlike its decision with regard to Rule 315(b), however, the Eighth Circuit's decision with regard to Rules 315(c)-(f) was not before the Supreme Court. The Court's holding concerning Rule 315(b), however, confirms that the Eighth Circuit's interpretation of the Act was incorrect. The Court firmly stated that the Act's mention of "unbundled access" does not even "'remotely imply" that elements must be provided only in uncombined form and never in combined form. Iowa Utils. Bd., 119 S.Ct. at 737. The Eighth Circuit's decision to vacate the FCC regulation certainly still stands, and is immune under the Hobbs Act from collateral attack. See 28 U.S.C. § 2342; MFS Intelenet, 193 F.3d at 1120. All this means for the purposes of the present appeal is that the Act does not currently mandate a provision requiring combination. Our task is to determine whether such a provision "meets the requirements" of the Act, i.e., to decide whether a provision requiring combination violates the Act. The Supreme Court's interpretation of the Act makes absolutely clear that it does not, and we have already so held. See MFS Intelenet, 193 F.3d at 1121. The district court's invalidation of this provision must be reversed as well so that the original provision is restored to the agreement.

DARK FIBER

The agreement contains a provision requiring U S West to provide MCImetro with dark fiber on an unbundled basis. Dark fiber is fiber optic cable laid in the ground but not yet activated for use. The FCC's original "network elements" rule did not mandate unbundled access to dark fiber, but the district court held that an interconnection agreement provision requiring such access did not violate the Act. The district court's conclusion has since been solidified by the FCC's new rule, which treats dark fiber as a network element and therefore mandates U S West to provide competitors with access to it. See 47 C.F.R. § 51.319(a)(1). Because unbundled access to dark fiber is now not only consistent

with the Act but affirmatively required by it, we affirm the district court on this issue.

CO-LOCATION OF REMOTE SWITCHING UNITS

U S West also challenges a provision of the agreement requiring U S West to allow MCImetro to co-locate remote switching units ("RSUs"). "Co-location" refers to an ILEC's obligation under the statute to permit CLECs to install equipment on the ILEC's property in order to connect to the ILEC's existing network. Section 251(c)(6) of the Act imposes upon ILECs a duty to provide for "physical co-location of equipment necessary for interconnection or access to unbundled network elements on the premises of the local exchange carrier." The WUTC employed the FCC's definition of "necessary" as anything "useful" for interconnection, and concluded that RSUs fit the bill. The WUTC therefore added a provision to the agreement requiring U S West to permit co- location of RSUs. The district court held that the provision did not violate the Act and refused to strike it from the agreement.

U S West argues that we must strike the provision because the WUTC relied on the FCC's interpretation of the word "necessary," an interpretation with which the Supreme Court has found fault. See Iowa Utils. Bd., 119 S.Ct. at 735. Were we reviewing this agreement under the judicial review standards of the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq., we might agree with U S West that the agency's use of an improper definition of "necessary" requires us to return the agreement to the agency for reconsideration. The APA requires reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions" found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C.§ 706.

We are not reviewing the actions of a federal agency subject to the APA, however. Here, our task is not to examine possible flaws in the WUTC's decision-making process, but to decide whether a provision resulting from that process-the provision requiring co-location-has resulted in an agreement that fails to "meet the requirements" of the Telecommunications Act. 47 U.S.C. § 252(e)(6). Although the Act may not require the provision, it certainly does not proscribe it. Sections 251 and 252 of the Act are designed to provide some flexibility in fixing the provisions of interconnection agreements. Hence, we conclude that the provision is valid and affirm the district court.

SHARED TRANSPORT

Shared transport refers to cable that connects facilities owned by different parties. The agreement did not require U S West to provide MCImetro with unbundled access to shared transport, despite an FCC rule mandating such access. Relying on the FCC rule, the district court held that because the agreement failed to include a provision requiring unbundled access to shared transport, the agreement in that respect failed to meet the requirements of the Act.

Subsequent to the district court's decision, the Supreme Court vacated the rule in question. The Court held that in promulgating the rule, the FCC had construed too permissively the congressional requirement that elements should only be subject to unbundled access if "necessary" and if lack of access to them would "impair" a competing carrier from providing services. See 119 S.Ct. at 736.

The FCC has now promulgated a new network elements rule, this time taking into account the Supreme Court's directives in Iowa Utils. Bd. Once again, the regulations require unbundled access to shared transport, though under limited circumstances. See 47 C.F.R. § 51.319(d)(1)(C). Apparently, shared transport is now required only when ILECs are also providing local circuit switching. See In the

Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order, FCC 99-238 (Nov. 5, 1999) at ¶ 369 ("[W]here an incumbent LEC provides requesting carriers with access to unbundled switching, we require incumbent LECs also to provide access to unbundled shared transport services.").

Because the present rule is narrower than the rule relied upon by the district court, we reverse the district court's decision. We remand so that the district court may consider whether to order a new provision or direct the parties to return to the WUTC in light of the special local considerations that may be relevant.

BILL AND KEEP

The Telecommunications Act requires that interconnecting ILECs and CLECs compensate each other for the cost of one party's transport and termination of traffic originating on the other party's network. See 47 U.S.C. § 251(b)(5). Before the WUTC arbitrator, MCImetro proposed and U S West opposed a method known as "bill and keep," a sort of rough justice approach under which the parties simply assume that for every U S West customer for whom MCImetro must pay transport and termination costs there will be an MCImetro customer for whom U S West must do likewise. The parties therefore just bill their own customers for traffic on their own networks and keep all of that revenue rather than making regular and presumably roughly equal exchanges of transport and termination costs. The arbitrator heard evidence from both sides, and decided to adopt the MCImetro bill and keep proposal, a decision that the WUTC approved and the district court upheld as consistent with the Act.

Section 251(b)(5) of the Act imposes upon ILECs a duty to establish reciprocal compensation arrangements, and section 252(d)(2)(A) provides that state agencies cannot find

a reciprocal compensation arrangement "just and reasonable" under the Act unless it provides for "the mutual and reciprocal recovery by each carrier" of transport and termination costs and "determines such costs on the basis of a reasonable approximation of the additional costs of terminating such calls." Section 252(d)(2)(B) states, however, that the Act "shall not be construed ... to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery such as bill-and-keep arrangements." (Parentheses omitted.) The Act therefore does not preclude arrangements such as the one contained in the agreement between U S West and MCImetro.

U S West argues, however, that it presented sufficient evidence in this case to demonstrate that its cost of transporting and terminating MCImetro calls so exceed MCImetro's costs so that bill and keep is neither just nor reasonable in these circumstances and therefore violates the Act. U S West assigns error to the arbitrator's use of a presumption that calls between carriers will be in balance, arguing that the presumption is contained in one of the FCC rules the Eighth Circuit stayed before it ruled on the merits in Iowa Utilities Board and was therefore technically not in effect at the time the arbitrator made his decision. The rule (since reinstated by the Supreme Court) simply provides that "[n]othing in this section precludes a state commission from presuming" that traffic is in balance. 47 C.F.R. § 51.713(c). It does not require the presumption, but rather clarifies that such a presumption is not foreclosed by the FCC's own regulations.

As the arbitrator explained, the WUTC has a general policy favoring bill and keep arrangements. Because we are dealing with a new competitive relationship, the evidence on actual costs contained in the record consists only of speculation on the part of U S West and the statement from a

WUTC official, reasonable at least on its face, that costs will be equal even if traffic volume is out of balance as long as individual customers make about as many calls as they receive. Given the impossibility of more concrete data, and Congress's generally permissive attitude toward bill and keep arrangements as expressed in the Act, the arbitrator's decision to impose the system does not violate the Act as a matter of law and is sufficiently supported by substantial evidence.

UP FRONT CONSTRUCTION CHARGES

The agreement requires U S West to undertake construction if necessary to meet MCImetro's interconnection requests. U S West does not contest the substance of this provision, but argues that the fact that the agreement does not require MCImetro to pay its construction charges up front rather than after construction is completed violates the Act. The district court rejected this argument and upheld this provision of the agreement.

U S West's sole argument rests on the Eighth Circuit's decision to vacate an FCC rule requiring an ILEC to provide CLECs with interconnection at levels of quality superior to those at which the ILEC provides the same services to itself. See Iowa Utils. Bd., 120 F.3d at 812. The Eighth Circuit held that the Act merely requires equal quality. Id. This holding about quality of service is not relevant to the question of when construction costs are to be paid. U S West cannot point to any provision of the Act or FCC regulations that states or even implies that construction costs must be paid up front. We therefore affirm the district court's decision to uphold the agreement's construction provision as approved by the WUTC.

OBJECTIVE PERFORMANCE STANDARDS

The agreement currently requires U S West to provide services to MCImetro as quickly as U S West provides them to itself. MCI wants the agreement to contain "objective

performance standards," or, in other words, hard numbers on these time limits. MCI wants the agreement to state in exactly how many days U S West must provide a particular service. MCI suggests that the WUTC was required to include objective performance standards by an FCC rule to that effect.

MCI actually is referring to language in the FCC's First Report and Order, which is not itself an FCC "rule." The Order explains why the FCC chose to promulgate the rules it did, and why it accepted the arguments of some commenters and rejected those of others. With regard to the issue of nondiscriminatory access to unbundled network elements and just, reasonable and nondiscriminatory terms and conditions for the provision of unbundled network elements, the Order focused on two questions: (1) should the FCC promulgate any national rules at all, and (2) if so, what should those rules be?

In a section titled "Comments," the FCC put forth the positions of the various commenters on these two issues. Regarding the second issue, the Order mentions that during the notice and comment period MCI argued that the FCC "should adopt specific standards, including time limits, for implementation of requests for unbundled elements." In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order, FCC 96-325 (Aug. 8, 1996) at ¶ 300. ("First Report and Order"). The Order goes on to state that a "number of incumbents, including Bell Atlantic, SBC, GVNW, and NYNEX, contend that we should not set specific rules, including time limits, for installation, service, maintenance and repair because incumbent LECs have different operational and administrative systems, and are subject to different state standards." Id. at ¶ 301.

In a section titled "Discussion," the FCC explained that it had decided to reject the suggestion to promulgate no national rules at all. Instead, the FCC adopted "general,

national rules defining 'nondiscriminatory access' to unbundled network elements, and 'just, reasonable, and nondiscriminatory' terms and conditions for the provision of such elements." First Report and Order at ¶ 308. The FCC indicated that the general rules would "rely" on the states to develop more specific ones "in arbitrations and other state proceedings" because states were better situated to do so. Id. at 310. The FCC further stated: "We expect that the states will implement the general nondiscrimination rules set forth herein by adopting, inter alia, specific rules determining the timing in which incumbent LECs must provision certain elements...." Id.

This language in the Order demonstrates that the FCC hoped (or "expected") that the states would adopt specific rules. Neither the Act nor any FCC rule affirmatively requires states to do so, however. The FCC might have wanted the WUTC to impose more specific requirements, such as objective performance standards, on an incumbent like U S West, but again, our review seeks to determine solely whether the lack of those requirements violates the Act. In the absence of an FCC rule, the law does not require them.

CONCLUSION

We affirm the district court's decision with respect to the following: (1) the validity of the provision requiring unbundled access to dark fiber, (2) the validity of the provision requiring co-location of RSUs, (3) the validity of the provision imposing the bill and keep method of reciprocal compensation, (4) the refusal to add to the agreement a provision requiring MCImetro to pay its construction charges up front, and (5) the validity of the agreement's failure to include "objective" performance standards.

We reverse the district court's decision with respect to the following: (1) the validity of the provision prohibiting U S West from separating already-combined network elements,

(2) the validity of the provision requiring U S West to combine network elements at MCImetro's request, and (3) the addition of a provision requiring unbundled access to shared transport.

The overall result is that the original agreement between U S West and MCImetro has been restored in all respects with the possible exception of shared transport. We remand the issue of shared transport for further consideration.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Each party should bear its own costs.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-35789
D.C. No. CV-97-01320-BJR

U S WEST COMMUNICATIONS, INC.,
Plaintiff-Appellee,

v.

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC.,
Defendant-Appellant.

No. 98-35828
D.C. No. CV-97-01320-BJR

U S WEST COMMUNICATIONS, INC.,
Plaintiff-Appellee/Cross-Appellant,

v.

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC.,
Defendant-Appellant/Cross-Appellee,

and

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION; ANNE LEVINSON, Chairperson;

RICHARD HEMSTAD, Commissioner; WILLIAM P. GILLIS, Commissioner,

Defendants-Appellees.

No. 98-35829
D.C. No. CV-97-01320-BJR

U S WEST COMMUNICATIONS, INC.,

Plaintiff-Appellant/Cross-Appellee,

v.

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC.,

Defendant,

and

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION; ANNE LEVINSON, Chairperson; RICHARD HEMSTAD, Commissioner; WILLIAM P. GILLIS, Commissioner,

Defendants-Appellees/Cross-Appellants.

MEMORANDUM[1]

Appeal from the United States District Court
for the Western District of Washington
Barbara J. Rothstein, Chief District Judge, Presiding

Argued and Submitted October 7, 1999
San Francisco, California

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

Before: GOODWIN, SCHROEDER, and GRABER, Circuit Judges.

U S West Communications, Inc., AT&T Communications of the Pacific Northwest, Inc., and the Washington Utilities and Transportation Commission all appeal an order granting in part and denying in part cross-motions for summary judgment. U S West and AT&T both challenge an interconnection agreement approved and modified by the WUTC pursuant to the Telecommunications Act of 1996. All of the issues in these appeals are addressed in our opinion in *MCI Telecommunications Corp. v. U.S. West Communications*, Nos. 98-35819 and 98-35820.

The district court correctly upheld the provisions relating to dark fiber, co-location of remote switching units, bill and keep, and time of payment for construction charges. We affirm its decision on these provisions. The district court also should have upheld the provisions relating to separating and combining network elements, and we reverse its decision on those provisions. For the reasons stated in our *MCI* opinion, we reverse and remand the shared transport issue for further consideration.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-35821
D.C. No. CV-97-01764-BJR

U S WEST COMMUNICATIONS, INC., a Colorado corporation,

Plaintiff-Appellee,

v.

SPRINT COMMUNICATIONS COMPANY L.P. ("SPRINT"), a limited partnership,

Defendant-Appellant,

and

ANNE LEVINSON, Chairwoman; RICHARD HEMSTAD, Commissioner; WILLIAM P. GILLIS, Commissioner, in their official capacities as Commissioners of the Washington Utilities & Transportation Commission; WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,

Defendants.

No. 98-35823
D.C. No. CV-97-01764-BJR

U S WEST COMMUNICATIONS, INC., a Colorado corporation,

Plaintiff-Appellee,

v.

SPRINT COMMUNICATIONS COMPANY L.P. ("SPRINT"), a limited partnership, ANNE LEVINSON, Chairwoman; RICHARD HEMSTAD, Commissioner; WILLIAM P. GILLIS, Commissioner, in their official capacities as Commissioners of the Washington Utilities & Transportation Commission;

Defendants,

and

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,

Defendant-Appellant.

MEMORANDUM

Appeal from the United States District Court
for the Western District of Washington
Barbara I Rothstein, Chief District Judge, Presiding

Argued and Submitted October 7, 1999
San Francisco, California

Before: GOODWIN, SCHROEDER, and GRABER, Circuit Judges.

Sprint Communications, Inc. and the Washington Utilities and Transportation Commission both appeal an order of summary judgment in favor of U S West Communications, Inc. regarding an interconnection agreement approved by the WUTC pursuant to the Telecommunications Act of 1996. Only two aspects of the district court's decision are challenged on appeal. Both issues are addressed in our opinion in *MCI*

Telecommunications Corp. v. U.S. West Communications, Nos. 98-35819 and 98-35820.

The district court should have upheld the provisions relating to separating and combining network elements. We reverse its decision on these provisions so that the district court can reinstate them.

REVERSED AND REMANDED.

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C97-1508R
(Consolidated)

MCI TELECOMMUNICATIONS CORP., et al.,

Plaintiffs,

v.

U S WEST COMMUNICATIONS, INC., et al.,

Defendants.

ORDER GRANTING IN PART AND
DENYING IN PART CROSS-MOTIONS
FOR SUMMARY JUDGMENT

MCI Telecommunications Corp. and MCI Metro Access Transmission Services, Inc. ("MCI")brought this action pursuant to the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 252(e)(6), for judicial review of an agreement approved by the Washington Utilities and Transportation Commission ("WUTC") concerning interconnection between MCI and U S West Communications, Inc. ("U S West"). MCI seeks to compete in the local telecommunications market. The defendants are U S West and the WUTC and its commissioners. The FCC has filed a brief amicus curiae.

All parties have moved for summary judgment. U S West asserts that certain terms of the agreement are inconsistent with Sections 251 and 252 of the Act, with Iowa Utilities Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), cert.

granted, AT&T v. Iowa Utilities Bd., 118 S. Ct. 879 (1998), and with FCC regulations. MCI says that the agreement should have provided for: "shared transport" as an unbundled network element; nondiscriminatory access to OSS; deaveraged rates for unbundled network elements; performance standards and noncompliance compensation credits; and no nonrecurring charges.

The court has fully considered all the papers filed. Because there is no genuine issue of material fact for trial, the case will be decided as a matter of law pursuant to Federal Rule of Civil Procedure 56.[1]

I. BACKGROUND

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of Title 47, United States Code), was "designed, in part, to erode the monopolistic nature of the local telephone service industry by obligating the current providers of local telephone service . . . to facilitate the entry of competing companies into local telephone service markets across the country." Iowa Utilities Bd., 120 F.3d at 791. Specifically, the Act forces an incumbent local exchange carrier ("ILEC") (1) to permit new entrants to interconnect with the ILEC's existing network (interconnection) ; (2) to provide entrants access to the

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[1] The court finds it unnecessary to hear oral argument due to the clarity of briefing, sufficiency of the record, and the similarity of most issues to cases decided by other courts.

This case contains many issues substantially similar or identical to two other cases involving U S West and the WUTC: U S West Communications, Inc. v. AT&T Communications of the Northwest, Inc., No. 97-1320R (consolidated); and U S West v. Sprint Communications Co., No. 97-1764R. As a result, U S West and the WUTC each filed consolidated briefs for all three cases, and U S West's competitors collaborated on a single brief regarding standard and scope of review. The court has issued separate orders in the AT&T and Sprint cases contemporaneously with this one.

ILEC's individual "network elements" on an unbundled basis (unbundled access) ; and (3) to sell to entrants at a wholesale rate any telecommunications service that the ILEC offers at retail to its own customers, so that the new entrant can resell it (resale). 47 U.S.C. §§ 251-52.

The Act creates a multi-step process through which entrants to the local telephone market ("competing local exchange carriers" or "CLECs") gain use of the ILEC's network and services. First, both parties must negotiate. 47 U.S.C. §§ 251(c)(1), 252(a)(1). If negotiations stall, either party may petition the state utility commission for arbitration on the unresolved issues. Under the WUTC's procedure, when an impasse is reached, the arbitrator employs a modified "final offer" system: she will choose between the parties' last proposals; if they both conflict with the Act or WUTC policy, she will make a decision consistent with these requirements. Any final agreement, whether reached voluntarily or through arbitration, must be approved by the state commission. 47 U.S.C. § 252(e)(1).

MCI and U S West seek review of their final agreement under 47 U.S.C. § 252 (e)(6).[2]

II. SCOPE AND STANDARD OF REVIEW

As to scope of review under 47 U.S.C. § 252(e)(6), the court confines consideration to the administrative record and will not hold a de novo proceeding. See United States v. Bianchi & Co., Inc., 373 U.S. 709, 715 (1963); see, e.g., GTE South Inc. v. Morrison, No. 3:97CV493, slip op. at 6-7 (E.D. Va. May 19, 1998); TCG Seattle, slip op. at 3.

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[2] Review of this final agreement extends necessarily to the underlying orders made by the WUTC throughout the arbitration period that became part of the agreement. See U S West Communications, Inc. v. TCG Seattle, No. C97-354WD, slip op. at 3 (W.D. Wash. Jan. 22, 1998) [hereinafter "TCG Seattle"].

As to the standard of review, the parties agree that a state agency's legal interpretation of the Telecommunications Act is reviewed de novo. See Orthopaedic Hosp. v. Belshe, 103 F.3d 1491, 1495 (9th Cir. 1997). This interpretation is not due deference as is a federal agency's under Chevron U.S.A. Inc. v. Natural Resources Defense Counsel Inc., 467 U.S. 837, 843 (1984), because a state agency lacks the impetus, expertise and capability to harmonize federal law that a federal agency has. See Orthopaedic Hosp., 103 F.3d at 1495-96.

The WUTC's factual findings, however, will be reviewed as to whether they are arbitrary or capricious. See MCIMetro Access. Transmission Services, Inc. v. GTE Northwest, Inc., No. C97 742WD, slip op. at 4 (W.D. Wash. July 7, 1998) [hereinafter GTE Northwest]. The Act authorizes the state commissions to hear evidence and set rates and schedules, subject to district court review of whether they have complied with the Act and FCC pronouncements. See 47 U.S.C. § 252(b)-(e); Iowa Utilities Bd., 120 F.3d at 806.

If the district court finds invalid an aspect of the agreement, it will strike that portion and remand to the state commission for renegotiation. See AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc., No. 5:97-CV-405-BR, slip op. at 15-16 (E.D.N.C. May 22, 1998) [hereinafter "AT&T v. BellSouth"].

III. U S WEST'S CLAIMS

A. Combining Unbundled Elements

Prices for unbundled access are "'cost-based." 47 U.S.C. §§ 251(c)(3), 252(d)(1). Prices for resold services are "on the basis of retail rates charged to subscribers for the telecommunications service," minus the cost avoided by the ILEC of selling the service wholesale ("wholesale"). 47 U.S.C. § 252(d)(3). U S West argues that the MCI

agreement violated the Act by requiring it to combine unbundled network elements for sale at a "cost-based" price rather than at a "wholesale" price."[3] It is correct.

The Act provides: "An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." 47 U.S.C. § 251(c)(3) (emphasis added). The Eighth Circuit interpreted this sentence to mean that "requesting carriers will combine the unbundled elements themselves." Iowa Utilities Bd., 120 F.3d at 813. That is, while the Act requires ILECs to provide unbundled elements to CLECs, it could not be read "to levy a duty on the incumbent LECs to do the actual combining of elements." Id. The court clarified:

> Section 251(c)(3) requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to a combined) basis. Stated another way, § 251(c)(3) does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements) in order to offer competitive telecommunications services.

Id.

MCI contends that U S West waived any challenge to the combining provisions because it did not raise this

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[3] (See MCI Agreement, Att. 3 ¶¶ 11 2.4 ("U S West shall offer each Network Element individually and in combination with any other Network Element or Network Elements in order to permit MCIm to provide Telecommunications Services to its subscribers."), 2.5. ("Where U S West provides combined Network Elements at MCIm's direction, however, no demarcation point shall exist between such contiguous Network Elements.").)

particular argument before the WUTC. U S West's omission is immaterial. the arbitrator applied an FCC interpretation of the law that has since been repudiated. This court need not retrain from applying the current law.

MCI and the WUTC also argue that the court either lacks subject matter jurisdiction or should refrain from deciding this issue because U S West failed to exhaust the agreement's dispute resolution mechanism. Exhaustion of remedies is inapt here. First, the Act provides that "any party aggrieved" by a state commission's determination may bring a federal court action to determine whether an agreement contradicts the Act. The agreement's dispute resolution clause does not purport to deprive the court of this power, or purport to be a mandatory first step.

MCI maintains that the dispute resolution provision has not been triggered because of the Supreme Court's grant of certiorari of the Eighth Circuit decision. This court will follow the existing precedent set by Iowa Utilities and will not adopt a wait and see approach.

Substantively, MCI and the WUTC contend that Iowa Utilities constrained only the FCC's authority to require combining, leaving it open for state commissions to order combining of network elements based upon independent state grounds and their rate-setting authority. Iowa Utilities cannot be read so narrowly. According to Iowa Utilities, requiring ILECs, at cost based rates, to combine or not to separate already combined network elements violates the Act. See Iowa Utilities Bd., 120 F.3d at 813; see also GTE Northwest, slip op. at 7-8.

The court vacates the requirements that U S West combine/ restrain from separating network elements at cost-based rates, and remands to the WUTC to negotiate replacement language.

B. Reciprocal Access to Poles, Ducts, Conduits, and Rights-of-way

Section 251(b)(4) provides that all local exchange carriers have "[t]he duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with Section 224." (emphasis added) U S West argues that because it is required to provide such access to MCI, but MCI is not required to provide similar access to it, the agreement violates the Act. This is incorrect if one examines the cross-referenced Section 224.

Section 224(f)(1) provides that "[a] utility shall provide . . . any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." Section 224(a)(5), however, provides that "[f]or the purposes of this section, the term 'telecommunications carrier . . . does not include any incumbent local exchange carrier as defined in Section 251(h)." U S West is an incumbent local exchange carrier as defined in Section 251(h); therefore, MCI is not obligated to provide reciprocal access to U S West.[4] The WUTC did not err.

C. Expanding Facilities.

U S West argues that certain provisions require it to provide superior quality access to MCI in violation of Section 251(c)(2)(C) because it must expand its facilities to accommodate competitors.[5] It also contends that the agreement improperly requires it to exercise eminent domain

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[4] The FCC, whose opinion was not relied upon here, agrees. See In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, FCC Docket No. 96-98, First Report and Order (August 8, 1996) ¶ 1231 [hereinafter FCC Order]. This paragraph was untouched by Iowa Utilities.

[5] The MCI agreement provides: "U S WEST shall take all reasonable steps to expand its facilities, which may include placement of taller poles or additional conduit, if necessary, to accommodate MCIm's request . . . ." (MCI Agreement, Part A ¶ 47.4.19.)

authority for the benefit of MCI.[6] Because all telecommunication providers can exercise eminent domain under Wash. Rev. Code 80.36.010, U S West argues that MCI should be required to expand its own rights-of-way. These assertions lack merit.

First, such expansion does not create superior quality access; it creates equivalent access. Because U S West can expand its capacity to suit its needs, "[t]he principle of nondiscrimination established by section 224(f) (1) requires that it do likewise for telecommunications carriers, ..." FCC Order ¶ 1162. The Eighth Circuit endorsed the FCC's statement that "the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements." Iowa Utilities, 120 F.3d at 813 n.33 (quoting FCC Order ¶ 198 (discussing technical feasibility)). The FCC declined to craft a rule categorically prescribing when a utility must expand an existing facility as requested versus when it may choose to decline due to infeasibility. FCC Order ¶ 1163. Nevertheless, it interpreted the Act "to require utilities to take all reasonable steps to accommodate requests for access in these situations. Before denying access based on a lack of capacity, a utility must explore potential accommodations in good faith with the party seeking access." Id. The WUTC relied upon the language of these valid FCC statements in approving these provisions.

Second, U S West bases its argument regarding its inability to exercise eminent domain on an imprecise interpretation of the law. Under state law, all telecommunications carriers indeed can exercise eminent

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[6] U S West refers to language in the agreement that provides that it will exercise its eminent domain authority when necessary to expand an existing right-of-way over private property in order to accommodate a request for access to that right-of-way. (See MCI Agreement, Part A ¶ 47.4.4)

domain. What's important is whether a competing carrier can have access to U S West's right-of-way, and consequently, U S West's existing network.

This court agrees with the WUTC's conclusions.

D. Non-Reciprocal Reservation of Excess Capacity

U S West argues that it is forced to provide superior quality access because it must permit MCI to reserve excess space on its poles, ducts, conduits, and is prevented from reserving such space for its own future use beyond emergency or maintenance spare. U S West is incorrect.

These agreement provisions exist to prevent U S West from discriminating in favor of itself:

> Permitting an incumbent LEC . . . to reserve space for local exchange service, to the detriment of a would-be entrant into the local exchange business, would favor the future needs of the incumbent LEC over the current needs of the new LEC. Section 224(f)(1) prohibits such discrimination among telecommunications carriers.

FCC Order ¶ 1170. The focus is on current use by MCI, rather than speculative future use by U S West. After a confirmed request for space is made, U S West must reserve it for ninety days, within which time MCI chooses whether to use or decline it. (MCI Agreement, Part A ¶ 47.4.10.) Quality is not the issue, parity is: the space either will be used or remain unused, not remain reserved for U S West indefinitely, unless safety dictates such a use.

The WUTC relied upon valid FCC proscriptions in approving these provisions.

E. Collocation of Remote Switching Equipment

U S West argues that the requirement that it collocate MCI's remote switching units (RSUs) in U S West's facilities violates the Act.[7] It is incorrect.

Section 251(c)(6) provides that U S West has "[t]he duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier . . ." The FCC defines "'necessary" as "used" or "useful," not "indispensable." FCC Order ¶ 579. Thus, transmission equipment may be collocated and state commissions may designate additional types of equipment to be collocated. FCC Order ¶ 580. The FCC held:

> At this time, we do not impose a general requirement that switching equipment be collocated since it does not appear that it is used for the actual interconnection or access to unbundled network elements. We recognize, however, that modern technology has tended to blur the line between switching equipment and multiplexing equipment, which we permit to be collocated. We expect, in situations where the functionality of a particular piece of equipment is in dispute that state commissions will determine whether the equipment at issue is actually used for interconnection or access to unbundled elements.

FCC Order ¶ 581 (emphasis added).

The WUTC here determined that RSUs are equipment necessary for interconnection or access to unbundled network

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[7] It refers to MCI Agreement, Part A ¶ 40.1.5. Collocation "enables a requesting telecommunications carrier to . . . [p]lace its own equipment to be used for interconnection or access to unbundled network elements within or upon an incumbent LEC's premises." 41 C.F.R. § 51.5.

elements and that without RSUs CLECs would be at a technical and economic disadvantage in the transmission and routing of telephone service. (See In re Petition for Arbitration of an Interconnection Agreement Between MCImetro Access Services, Inc. and U S West Communications, Inc., WUTC, Commission Order Approving Interconnection Agreement, Docket No. UT-960310 (Aug. 18, 1997), at 5-6 [hereinafter "MCI Approval Order"].) The WUTC found that an RSU was not a "switch" under 47 C.F.R. 51.323(c) because an RSU requires a host to perform essential functions. (See id., at 5-6.) These determinations were neither arbitrary nor capricious, were based on sufficient evidence, and were within the WUTC's discretion to decide.

F. Unbundling of Dark Fiber

U S West challenges the requirement that it provide MCI with "dark fiber" as an unbundled network element. Dark fiber is "fiber-optic cable that has been laid into a telecommunications provider's network but which is not 'lit' by electronics on either end of the cable, or at least not by electronics provided by the local carrier. No switches are routing digital impulses onto this fiber and it consequently carries no information." MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc., No. 5:97-CV-425-BR, slip op. at 6 (E.D.N.C. May 22, 1998) [hereinafter "MCI v. BellSouth"]. A "network element" is "a facility or equipment used in the provision of a telecommunications service," which includes "features, functions, and capabilities" provided by such facilities. 47 U.S.C. § 153(29). The FCC declined to address whether dark fiber should be unbundled as a network element because it lacked a sufficient record to decide. FCC Order ¶ 450. States may impose additional unbundling requirements so long as such requirements are consistent with the Act and FCC regulations. Id. at ¶ 244.

This is a two-step inquiry: (1) is dark fiber a network element; (2) if so, should it be unbundled? U S West argues first that "dark fiber" is not a network element because it is not actively "used" in the provision of telecommunications services. Alternatively, it argues that because dark fiber is proprietary, MCI must show a heightened need to use it. U S West's interprets "network element" too narrowly and has not shown that dark fiber should not be unbundled.

Dark fiber is a physical component that, if lit, undoubtedly would be a network element. The fiber is not on spools in a warehouse, it is already in the ground as part of a network, awaiting only an LEC's desire to attach the proper equipment. U S West's distinction is, therefore, purely temporal. It argues that "used" means only "currently used," not used in the sense of "employed for some purpose." Because the Act's does not specify a particular, technical definition of "used," such preciseness should not be implied.

In MCI v. BellSouth, slip op. at 6, the Eastern District of North Carolina found dark fiber to be a network element, vacating the state commission's order to the contrary. It relied on construing "network element" broadly, in the spirit of Iowa Utilities, and previous FCC language that dark fiber service was "wire communication."Id. at 6-9. Its reasoning is persuasive.

If a state commission determines that it is technically feasible for an ILEC to provide access to an unbundled network element, the commission may decline to require unbundling only if: (1) the network element is proprietary and the CLEC could provide the same service by using nonproprietary elements; or (2) failure to provide access "would not decrease the quality of, and would not increase the financial or administrative cost of, the telecommunications service" a CLEC seeks to offer. 47 C.F.R. § 51.317(b); see 47 U.S.C. § 251(c)(3), 251(d)(2). The burden is upon the ILEC to prove that an element is proprietary. FCC Order ¶ 283.

U S West argues for the first time that dark fiber is proprietary because revealing the existence of "dark fiber" shows its business plan for expansion. This argument is inapposite. Whether an element is proprietary is a factual, not a legal, question. U S West provided no evidence before the WUTC that dark fiber was proprietary and therefore never satisfied its burden of proof.

MCI, on the other hand, presented evidence that denying it access to dark fiber would decrease the quality and increase the cost of providing services. (See MCI Record, at 8921 (Testimony of Maria Mazullo).)

The WUTC did not err legally nor act arbitrarily or capriciously.

G. Pricing Claims

U S West contends that the WUTC approved prices, terms, and conditions that unjustly denied U S West adequate compensation.[8] The court reviews de novo whether the WUTC employed a methodology that, as a matter of law, violates the Act. The court reviews whether the WUTC's fact-finding, including choice of methodology, was arbitrary or capricious.

1. Unbundled Loop Prices

Simply stated, a local loop is the portion of the network that connects the customer with the network. The state commission determines whether the rates, terms, and conditions for such unbundled elements are just and reasonable. 47 U.S.C. §§ 251(c)(3), 252(d)(1). This determination is "based an the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element," must

[8] The prices set in the agreement and approved by the WUTC are interim prices: they are subject to change during the WUTC's generic price and cost proceeding.

be nondiscriminatory, and "may include a reasonable profit." 47 U.S.C. § 252(d)(1)(A).

The parties acknowledge that this means that price should be based on the forward-looking, i.e., incremental, costs of providing the element rather than on historic or embedded costs, and that the WUTC should, therefore, employ a TELRIC ("Total Element Long Run Incremental Cost") methodology. See FCC Order ¶ 678 (describing TELRIC). They disagree about which TELRIC model was better. The arbitrator accepted MCI's "Hatfield model," which produced a price of $11.33, and rejected U S West's independent cost study, which produced a price of $36.20.

The choice of the Hatfield model was neither legal error nor arbitrary or capricious. In a pre-Act proceeding, the WUTC approved an earlier version of the Hatfield model. See Washington Utilities and Transportation Comm'n v. U S West Communications, Inc., WUTC, Fifteenth Supplemental Order, Docket No. UT-950200, slip op. at 86 (April 11, 1996) [hereinafter "Fifteenth Supplemental Order"], aff'd, U S West Communications, Inc. v. Washington Utilities and Transportation Comm'n, 134 Wash. 2d 74 (1997). The FCC specified the Hatfield model as the kind of generic, forward-looking model that best comports with TELRIC principles. FCC Order ¶ 834.

The WUTC found U S West's proposed cost studies less reliable. While the Hatfield model used inputs consistent with inputs the commission had found to be reasonable, U S West's cost studies used unverifiable cost data, inputs that were inconsistent with the WUTC's rate order, and excessive allocation of costs that appeared to be an attempt to recover embedded costs. (See In re Petition for Arbitration of an Interconnection Agreement Between MCImetro Access Services, Inc. and U S West Communications, Inc., WUTC, Arbitrator's Report and Decision, Docket No. UT-960310 (Jan. 3, 1997), at 24-26 [hereinafter "First MCI Arbitration order"] (citing to prior WUTC proceedings).) The arbitrator

noted that U S West's price of $36.20 outstripped the figure in a prior Washington rate hearing ($8.96), U S West's own proposal for business service in that proceeding ($15.77), U S West's own loop cost calculations in that proceeding (less than $14.00), and U S West's proposed rates in prior filing ($16.83-$19.24). (See id.)

U S West argues nonetheless that the WUTC behaved arbitrarily and capriciously because it relied upon improper prices for inputs. In support, U S West points to the evidence that it presented to the arbitrator. This is an attack on the choice of the Hatfield model and an attempt to retry the facts.[9] While conflicting interpretations of the evidence exist, none of the arbitrator's choices were arbitrary or capricious.

2. Avoided Cost Discount

The Act provides that an ILEC must "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. § 251(c)(4)(A). U S West contends that it need not provide at wholesale rates those services that are offered to end users at a term or volume discount because this would constitute a double-discount. That is, prices are not retail" if already subject to a discount.

The FCC rejected this: "If a service is sold to end users, it is a retail service, even if it is priced as a volume-based discount off the price of another retail service." FCC order ¶ 951. Moreover, "restrictions on resale of volume discounts will frequently produce anticompetitive results without sufficient justification . . . . [S]uch restrictions should be considered presumptively unreasonable." Id. at 953. Any

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[9] Earlier, this court struck a U S West affidavit, the primary purpose of which was to criticize the Hatfield model. That the Hatfield model may be improving with time is no indication that the WUTC either chose it improperly or that the inputs should now be revised for this interim price proceeding.

possibility of a double discount is eliminated by permitting ILECs to prove that their avoided costs differ when selling large volumes. Id. The FCC has authority "to issue regulations regarding the incumbent LEC's duty not to prohibit, or impose unreasonable limitations on, the resale of telecommunications services." Iowa Utilities Bd., 120 F.3d at 819. The FCC's determinations here are valid and binding. The WUTC did not err in permitting a wholesale discount for all retail services.

3. One Point of Interconnection Per LATA

U S West challenges the WUTC's determination that MCI may establish a single point of interconnection ("POI") per Local Access Transport Area ("LATA"). U S West contends that the Act requires a CLEC to have a POI in each local calling area in which that CLEC offers local service and that the present plan compensates U S West inadequately. It is wrong.

Under the Act, a new entrant may interconnect with the ILEC's facilities "at any technically feasible point." 47 U.S.C. § 251(c)(2); see FCC Order ¶ 209. The ILEC is relieved of this duty to provide interconnection at a particular point only if it proves to the state commission that interconnection at that point is not technically feasible. 47 C.F.R. § 51.305(e). U S West does not contest that such a connection is technically feasible. The WUTC properly declined to consider the cost of a single POI per LATA because "[a] determination of technical feasibility does not include consideration of economic, accounting, [or] billing . . . concerns." 47 C.F.R. § 51.5; see U S West Communications, Inc. v. MFS Intelenet, Inc., No. C97-222WD, slip op. at 9 (W.D. Wash. Jan. 7, 1998) (reaching same conclusion for same reasons) [hereinafter "MFS Intelenet"].

4. "Bill and Keep" Compensation

U S West contends that the interim "bill and keep" arrangement adopted by the WUTC in the MCI agreement violates the Act because it provides for inadequate cost recovery. It is wrong.

Compensation provisions must "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination" of calls that originate on the other carrier's network facilities. 47 U.S.C. § 252(d)(2)(A)(i) An agreement may "afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements)." 47 U.S.C. § 252(d)(2)(B)(i). In an independent proceeding, the WUTC approved of bill and keep as a method of reciprocal compensation. See WUTC v. U S West Communications, Inc., WUTC, Fourth Supplemental Order, Docket No. 941464, slip op. at 29-32 (Oct. 31, 1995) [hereinafter "Fourth Supplemental Order"). Similarly, the FCC found that a state may impose a bill and keep arrangement when neither party can rebut the presumption that traffic between carriers is balanced. FCC Order ¶ 1111-13.

U S West never rebutted the presumption that traffic was not balanced with anything other than conclusory statements. (See MCI Record 3806-10, 3820-24, 8615.) In consideration of this, and that U S West's alternative was previously found to be inferior, see Fourth Supplemental Order, slip op. at 28, the WUTC did not act arbitrarily or capriciously by choosing bill and keep because it is consistent with the Act, WUTC policy, and FCC statements. See TCG Seattle, slip op. at 7 (approving bill and keep because permitted by Act, approved in independent WUTC proceeding, and approved by FCC).

5. Construction and Conditioning Charges an Local Loops

U S West challenges two aspects of the MCI agreement. It argues that: (1) U S West must "make changes to its

network facilities, services and operations to provide interconnection and unbundled elements" upon request, which means providing "superior services"; and (2) the WUTC failed to require MCI to pay conditioning charges for the local loop. Both contentions lack merit.

First, U S West improperly proposes that this is a "superior access" issue; this is a question of equivalent access for resale services. U S West is providing MCI no more than it provides itself: local loop for an end user. MCI must pay for construction the same charges that apply to a similarly situated U S West retail end user pursuant to U S West's retail tariffs. (See MCI Agreement, Att. 1, at ¶ 3.1.) Modification of an ILEC's facilities to accommodate interconnection or access to network facilities, as is required here, is contemplated by the Act. See Iowa Utilities Bd., 120 F.3d at 813 n.33.

Second, the WUTC did not act arbitrarily or capriciously when it rejected conditioning costs for local loops. In both cases, U S West provided no evidence that the cost of conditioning wasn't already included in the TELRIC price of a conditioned loop. (See First MCI Arbitration Decision, at 54.) As in U S West Communications v. TCG Seattle, "U S West presented no evidence of the actual costs of making changes to its network. . . .The arbitrator noted that U S West did not state in its proposal what is involved in conditioning, why a charge is needed, or how much the charge should be." TCG Seattle, slip op. at 6.

H. Compensation for Interim Number Portability

Number portability enables users who switch telephone companies to retain the same telephone number. See 47 U.S.C. § 153(30). Until a permanent number portability system is developed, an ILEC must provide number portability using interim methods. U S West uses "remote call forwarding," in which a call to a competitor's customer

dialed to the customer's old U S West number will be switched and forwarded to the competitor's number.

The Act provides that the costs of establishing number portability "'shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the [FCC]." 47 U.S.C. § 251(e)(2) (emphasis added). U S West contends that the MCI agreement fails to compensate it for the costs of providing interim number portability. It is incorrect because the agreement is consistent with the Act and with binding FCC orders.

U S West says that the WUTC erred by allocating the costs of number portability in the MCI agreement based on the amount of active local numbers each carrier has rather than on the number !of calls actually forwarded. The FCC explicitly authorized allocation of cost recovery based on the number of active lines. Telephone Number Portability, First Report and Order and Further Notice Of Proposed Rulemaking, 11 F.C.C.R. 8352, at ¶ 136 (1996). It specifically rejected the kind of plan proposed by U S West because it would impose the full cost of number portability on new entrants. Id. at ¶ 138; see also TCG Seattle, slip op. at 9 (rejecting same U S West contentions).

I. Requirements Imposed Upon U S West Dex

U S West Dex ("Dex") and U S West Communications, Inc. (the party here), are each wholly owned subsidiaries of U S West, Inc. ("Parent"). Dex is the publishing branch of the parent, and publishes U S West's white and yellow page directories; it is not party to the MCI agreement. Nevertheless, the MCI agreement provides:

> For white pages and yellow pages advertising, U S West shall ensure that (a) U S WEST's directory publisher sell such advertising on a nondiscriminatory basis to MCI[] Customers, and (b) charges for such advertising will be billed by U S WEST's directory publisher in the

> same manner as it bills for U S WEST's customers' advertisements.

(MCI Agreement, Att. 5, at ¶ 7.1.12.)

U S West contends that the MCI agreement imposes requirements on Dex that are beyond the scope of the Act and the WUTC's authority. MCI and the WUTC argue that because U S West and Dex are sister corporations under the real control of the Parent, such requirements are proper. U S West is correct.

U S West, as a utility, is regulated by the WUTC; Dex, as a publisher/advertiser, is not. See U S West, Inc. v. Nelson, No. 97-35551, slip op. at 6027, 6034 (9th Cir. June 16, 1998). The Ninth Circuit explained:

> This regulatory loophole might encourage [the Parent] to attribute its costs to the regulated [U S West], while shifting its profits to the unregulated [Dex]. To correct for this and other similar incentives, the [WUTC] has developed several accounting practices of its own. One of these practices, imputation, involves adjusting the revenue requirement of the regulated affiliate to realize portions of the cost savings . . . that the affiliated family--regulated or not--has experienced as a whole.

Id. This does not mean, however, that the scope of regulations has expanded. The WUTC exercises the power to impute Dex's income to U S West through its regulatory power over rates: "The [WUTC] exercises no jurisdiction over advertising . . . . Only the utility is regulated or affected, pursuant to statutory and Constitutional authority." Fifteenth Supplemental Order, slip op. at 35 (emphasis added).

The Act provides that all telecommunications carriers have the duty to provide nondiscriminatory access to

directory listing. 47 U.S.C. § 251(b)(3). This imposes no new requirements on nonregulated entities, such as Dex; it codifies the pre-existing policy rationale that directory listing is essential to telecommunications. In a pre-Act proceeding, the WUTC discussed listing issues, distinguishing between U S West and its directory publisher. See Fourth Supplemental Order, slip op. at 56-57. It required U S West to: (1) include in its database all listings of subscribers submitted to them by companies serving the same area; (2) provide the same database to the company's directory publishing subsidiaries and other directory publishers; (3) provide simple listings in the published directories; and (4) provide this service with no additional charge. Id. at 57.

The MCI arbitrator recommended that the parties conform both to the Fourth Supplemental Order and the AT&T agreement.[10] The MCI agreement provision goes further than that. The Fourth Supplemental Order and the AT&T agreement required U S West to control functions over which it had power; essentially, U S West was to collect its competitors' listings with its own and have the entire list published by Dex. In contrast, the MCI agreement forces U S West to set the terms and monitor a contract between (a) Dex and (b) MCI's customers, though neither is a party to the MCI agreement.

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[10] The AT&T agreement's arbitrated clause provides:

> The publication of directories, Directory Listings, directory databases and associated related services shall be governed by the terms and conditions contained within [the Fourth Supplemental Order]. To the extent not inconsistent therewith, the following Section 44 shall apply.

AT&T Agreement, Part A ¶ 44. Section 44 contains negotiated language in which U S West provides, inter alia, that the master directory listing will include AT&T customers and that AT&T customers will receive the same courtesy listings that U S West provides to its own customers.

The WUTC had no authority to force U S West to regulate Dex. MCI Agreement, Att. 5, at ¶ 7.1.12, is struck and remanded to the WUTC to negotiate replacement language.

J. Due Process

U S West contends that the WUTC violated its due process rights because its decisions were not based on evidence in the record. The record refutes this contention.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Matthews v. Eldridge, 424 U.S. 319, 333 (1976). This was provided here. If the WUTC made errors, the errors were legal and not of constitutional magnitude. All its determinations were based on adequate evidence and none of its decisions on U S West's claims were arbitrary or capricious. See TCG Seattle, at 10 (denying U S West's due process claim).

K. Taking

U S West argues that the WUTC's approval of the agreement amounts to an unconstitutional taking. As Judge Dwyer noted:

> A taking claim under the United States Constitution is not ripe until (a) there is a final decision by the state regarding the property; and (b) the plaintiff has attempted to obtain just compensation for the property in state court. Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186-97 (1985).

TCG Seattle, slip op. at 10. These requirements have not been met here. U S West's taking claim is dismissed without prejudice.

Because this claim seems identical to the ones disposed of in GTE Northwest, TCG Seattle, and MFS Intelenet, U S

West now argues that it is not seeking compensation for a taking; it is seeking declaratory and injunctive relief to prevent a taking, "to demonstrate that its property may not be invaded and that it may not be required to provide access to its property on a below-cost basis." (U S West Motion for Summary Judgment, at 81.) This is circular. The Fifth Amendment says that property cannot be taken "without just compensation." U S West's claim is still not ripe because the WUTC has not set permanent prices and U S West has not sought compensation in state court. Moreover, the court has found none of the interim price determinations to be arbitrary or capricious.

IV. MCI'S CLAIMS

A. Shared Transport

MCI contends that the Act requires that "shared transport" be offered as an unbundled network element. 'Shared transport" is a function performed by interoffice transmission facilities in an ILEC's network. It seeks to share (with other CLECs and U S West) the capacity to transport calls between two U S West end offices directly, rather than having the calls routed through an extra "tandem" switch, or purchasing more costly "dedicated transport.

As mentioned earlier, a "network element" includes features, functions, and capabilities of any facilities that are used to provide telephone service. 47 U.S.C. §§ 153(29). The FCC is authorized to determine what network elements must be unbundled. 47 U.S.C. § 251(d)(2); see Iowa Utilities Bd., 120 F.3d at 802 n.23. It determined that network elements include shared transport. FCC Order ¶ 440-41. These FCC determinations were untouched by the Eighth Circuit. See Iowa Utilities Bd., 120 F.3d at 808-810, 818 n.38.

The FCC regulations define "shared transport" as "transmission facilities shared by more than one carrier, including the incumbent LEC, between end office switches,

between end office switches and tandem switches, and between tandem switches, in the incumbent LEC network." 47 C.F.R. § 51.319(d)(1)(ii). This description was clarified by another FCC order: "[T]he obligation of incumbent LECs to provide requesting carriers with access to shared transport extends to all incumbent LEC interoffice transport facilities, and not just to interoffice facilities between an end office and a tandem." In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Third Order on Reconsideration and Further Notice of Proposed Rulemaking, CC Docket No. 96-98, 12 F.C.C.R. 12460 (Aug. 18, 1997), at ¶ 25.

The WUTC did not permit MCI access to shared transport because it thought that "shared transport" was a service rather than a network element. (See MCI Approval Order, at 13-14.) That reasoning was flawed. Capabilities may be offered simultaneously as services or unbundled elements. Iowa Utilities Bd., 120 F.3d at 809.

The WUTC and U S West argue that because MCI sought shared transport only in post-arbitration proceedings, it should be procedurally barred from seeking it now. They argue that it should instead use the agreement's Bona Fide Request for Further Unbundling (BFR) process. This is incorrect. No procedural bar exists because the question is legal, not factual: is shared transport a network element subject to unbundling? The court concludes that it is. The BFR process provides an alternative process by which MCI may gain additional, not-yet-specified elements.

B. Nondiscriminatory Access to OSS

"Operations support systems ["OSS"] functions consist of pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by an incumbent LEC's databases and information." 47 C.F.R. § 51.319(f)(1). An ILEC must provide nondiscriminatory access to OSS as an unbundled network element. Id.; 47 U.S.C. § 251(c)(3);

Iowa Utilities Bd., 120 F.3d at 308-10. Nondiscriminatory access to OSS means "the incumbent must provide access to these functions under the same terms and conditions that they provide these services to themselves or their customers." FCC Order ¶ 316; see id. at ¶ 518. An incumbent must comply with this requirement "as expeditiously as possible, but, in any event, no later than January 1, 1997." 47 C. F. R. § 51.319(f)(2); see FCC Order ¶ 525.

Presently, MCI gains access to OSS through an interim method, which is based on Web technology. It would like to gain access at parity with U S West through a real-time electronic interface. Apparently, however, the arbitrator thought that the Act required parity access only after it was developed through national standards or when U S West could provide it. He explained: "It is clear that the current situation [Web-based access] is not parity and that national standards are the most effective long term solution. In the meantime, U S WEST should comply with the FCC order to the maximum extent possible." (First MCI Arbitration Decision, at 60.)

MCI contends that the WUTC should not have permitted inferior OSS access to continue until now because the FCC requires parity access by January 1, 1997. Although the agreement adopts MCI's proposal for a real-time electronic interface as the ideal solution, the interim measures remain in effect with no clear termination date. (See MCI Agreement, Att. 5, §§ 2.3.1, 5.2.1 (requiring U S West to provide OSS functions on real-time, electronic basis); Att. 5, §§ 2.3.2, , 5.2.9 (requiring that MCI and U S West to develop interim solutions).)

Contrary to the WUTC's and U S West's assertions, the January 1, 1997 deadline was mandatory rather than a target date. The FCC determined that "providing nondiscriminatory access to operations support systems functions is technically feasible," FCC Order ¶ 520, so OSS must be provided now.

The MCI arbitrator purported to follow the AT&T arbitrator's decision. (First MCI Arbitration Order, at 60.) The AT&T decision criticized Web-based access as inferior and not in accordance with the FCC's pronouncement, but permitted it to be used for pre-ordering because the parties had agreed to develop this interim system together. In re Petition for Arbitration of an Interconnection Agreement Between AT&T Communications of the Pacific Northwest, Inc. and U S West Communications, Inc., WUTC, Arbitrator's Report and Decision, Docket No. UT-960309, at 25 (Nov. 27,1996).

No such agreement existed here. The provisions for interim access are contrary to binding FCC regulations and should be removed. The provisions for parity access should remain, but revised to include a clear deadline. The only district court to examine this issue came to the same result: "[T]he [state commission] has overstepped its bounds in the hopes of reaching a reasonable compromise. FCC regulations required action to be taken by a date certain, and did not envision an open-ended process of reassessment. Therefore, the issue is remanded to the [state commission] to set a date certain by which electronic access to OSS must be made available to MCI." MCI v. BellSouth, slip op. at 21.

The court remands to the WUTC with instructions to set an immediate and firm deadline for parity OSS access. U S West may not disrupt providing MCI the best possible OSS access in the interim.

C. Deaveraging Rates for Unbundled Network Elements

MCI argues that the WUTC violated the Act because it refused to "deaverage" the rates for unbundled network elements. Deaveraging entails dividing the state into several geographic regions, and then using the average rate for each region as a basis for the price of network elements. The rationale underlying deaveraging is that rural areas are more

costly to serve, than urban areas and the closer one gets to the "actual" rates the better. MCI proposed three zones. The WUTC chose to retain a statewide average rate.

The Act does not address deaveraging; it provides that unbundled network elements must be "based on cost." 47 U.S.C. § 252(d)(1)(A)(i). The FCC required deaveraging into at least three zones per state, FCC Order. at ¶ 765; 47 C.F.R. § 51.507(f), but this command was vacated by the Eighth Circuit. Iowa Utilities Bd., 120 F.3d at 800 & n.21. State commissions have the exclusive authority to set rates. Id. In a pre-Act proceeding, the WUTC rejected a similar proposal by U S West to deaverage rates. It explained:

> Many factors led the [WUTC] to reject zone pricing in favor of a single statewide rate. There is no demonstration that USWC's proposed zones correctly place exchanges in the proper zones. Indeed, USWC has included some very rural exchanges in its so-called "urban" zone. Even if USWC had proposed a cost-based division of exchanges, the two zones would have contained exchanges that had different customer densities and therefore different costs.
>
> The same logic that would support the zone concept would then call for dividing each zone into sub-zones, with the only logical stopping point being a unique rate for each customer, reflecting that customer's costs.

Fifteenth Supplemental Order, slip op. at 106. The MCI arbitrator here relied upon this order when choosing not to deaverage for the interim prices; he said that it would be appropriate to consider this issue in the generic proceedings. (First MCI Arbitration Order, at 30.)

The legal question is whether the WUTC based the price of unbundled network elements on cost. It did: average

statewide costs. The more precisely one draws subdivisions, the closer one approaches the cost of providing service to an individual customer. Whether Washington is divided into three zones or left as one, average cost is always a proxy for "actual" cost. Pecuniary interest and public policy determines how to cut the pie. The WUTC did not err legally or act arbitrarily or capriciously in choosing one average rate.

D. Performance Standards and Noncompliance Compensation Credits

MCI says that the WUTC should have accepted its proposals for (1) detailed performance standards that U S West would have to meet, and (2) compensation credits that U S West would give MCI for noncompliance with these standards. MCI argues that because the WUTC didn't agree, no effective enforcement of the agreement exists, thereby violating the Act's requirement that access and services be provided on terms that are just, reasonable, and nondiscriminatory. These assertions lack merit.

An ILEC must provide a CLEC with access and services "at least equal in quality" to that provided to itself. 47 U.S.C. § 251(c)(2)(C); see 47 U.S.C. § 251(c)(3). Although the arbitrator found MCI's proposal consistent with the Act, he adopted the WUTC's general performance standards instead. (First MCI Arbitration Order, at 69.) The MCI agreement presently provides:

> The standard of performance for each of the measurements of performance in Washington shall be the quality of service which U S West provides in Washington to either itself, its ten (10) largest end user Customers in the aggregate, independent LECs in the aggregate, other CLECs in the aggregate, or other quality of service requirements imposed by the [WUTC], whichever is highest.

(MCI Agreement, Part A ¶ 52.1.1.) U S West must meet performance criteria for specified activities and during specified review periods. (Id., at ¶¶ 52.1.1-52.1.3.) If U S West fails to meet the performance criteria for two consecutive periods, MCI and U S West will negotiate or enter non-binding arbitration, and MCI may seek regulatory or legal relief, including requesting specific performance, (Id. at ¶ 52.2.) In approving this agreement, the WUTC held that if MCI needed more information or sought higher standards, it should use the agreement's BFR process. (MCI Approval Order, at 10.)

Although these provisions were not preferred by MCI, they do not violate the Act. MCI has not supported its accusation that these provisions are so unenforceable as to undermine the purpose of the Act; at most, its proposals would simply be "better." Moreover, the WUTC did not act arbitrarily or capriciously.

E. Nonrecurring Charges

The Act requires only that the rate "be based on the cost . . . of providing the interconnection or network element." 47 U.S.C. § 252(d)(1)(A)(i). Nonrecurring charges are the one-time costs that U S West incurs when a service is established, disconnected, or changed. MCI contends that such charges violate the Act because they are not based on efficient, forward-looking economic costs. It also contends that such charges were already accounted for in MCI's TELRIC pricing model, the Hatfield model, which the arbitrator accepted.

In this modified final-offer arbitration, the arbitrator selected U S West's nonrecurring charges because MCI did not propose such charges. (First MCI Arbitration Order, at 27.) He explained:

> MCImetro asserts that the Hatfield model recovers all costs but, unless the Commission decides in the generic case to recover all

> nonrecurring costs through recurring charges, the short duration of interim rates will prevent U S WEST from recovering nonrecurring costs. U S WEST's costs [sic] studies probably overstate nonrecurring costs to a similar extent as other costs, so the Arbitrator declines to require the parties to rerun the Hatfield model with the Arbitrator's choice of assumptions. The lower-than-perfect Hatfield numbers will tend to offset, albeit in a less-than-perfect way, the higher-than-perfect U S WEST nonrecurring cost numbers. A "perfect" match between TELRIC and prices is something the [WUTC) will be in a better position to pursue, to the extent anyone can perfectly estimate forward-looking costs over the long term, in the generic costing/pricing proceeding.

(Id.)

The arbitrator's decision is confusing because it is unclear whether he accepted U S West's nonrecurring charges because (1) the TELRIC model didn't include them; or (2) the TELRIC model did include them but the model would not adequately compensate U S West during the interim period before final prices. If the TELRIC model didn't include nonrecurring charges in calculating costs, then these charges are proper to compensate U S West. If the TELRIC model already included nonrecurring charges in the recurring rates, the additional charges provide U S West with improper double recovery.[11]

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[11] TELRIC stands for "Total Element Long Range Incremental Cost." A TELRIC model's advantage is, therefore, an ability to account for long-range costs. That such a model would inadequately compensate an ILEC for a short duration is self-evident, and not a disadvantage so long as such a model is also employed in the long term.

The court cannot understand the WUTC's rationale and so must remand on this issue. The WUTC is instructed to make a clear finding as to whether or not the accepted TELRIC model accounted for nonrecurring charges, rather than attempting to split the difference between a "too high" and a "too low" estimate of what may be separate charges. It is proper to levy nonrecurring charges so long as MCI's TELRIC model did not account for them.

V. WUTC'S CLAIMS

The WUTC moved for summary judgment on issues that U S West has decided not to pursue. (U S West Summary Judgment Motion, at 41 n.30.) These issues are moot.

VI. CONCLUSION

The summary judgment motions of MCI, U S West, and the WUTC are granted in part and denied in part in the ways set forth above. U S West's taking claim is dismissed without prejudice. MCI's claim regarding nonrecurring charges is remanded to the WUTC as specified above. As these rulings dispose of the case, judgment will be entered accordingly. No party will recover costs.

The clerk is directed to send copies of this order to all counsel of record.

DATED at Seattle, Washington this 21st day of July, 1998.

BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C97-1320R
(Consolidated)

U S WEST COMMUNICATIONS, INC.,

Plaintiff,

v.

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., et al.

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART CROSS-MOTIONS FOR SUMMARY JUDGMENT

U S West Communications, Inc. ("U S West") brought this action pursuant to the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 252(e)(6), for judicial review of an agreement approved by the Washington Utilities and Transportation Commission ("WUTC") concerning interconnection between U S West and AT&T Communications of the Pacific Northwest, Inc. ("AT&T"). AT&T seeks to compete in the local telecommunications market. The defendants are AT&T and the WUTC and its commissioners. The FCC has filed a brief *amicus curiae*.

All parties have moved for summary judgment. U S West asserts that certain terms of the agreement are inconsistent with Sections 251 and 252 of the Act, with *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *cert.*

granted, AT&T v. Iowa Utilities Bd., 118 S. Ct. 879 (1998), and with FCC regulations. AT&T says that the agreement should have provided for "shared transport" as an unbundled network element. The court has fully considered all the papers filed. Because there is no genuine issue of material fact for trial, the case will be decided as a matter of law pursuant to Federal Rule of Civil Procedure 56.[1]

(a) BACKGROUND

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of Title 47, United States Code), was "designed, in part, to erode the monopolistic nature of the local telephone service industry by obligating the current providers of local telephone service . . . to facilitate the entry of competing companies into local telephone service markets across the country." *Iowa Utilities Bd.*, 120 F. 3d at 791. Specifically, the Act forced an incumbent local exchange carrier ("ILEC") (1) to permit new entrants to interconnect with the ILEC's existing network (*interconnection*); (2) to provide entrants access to the ILEC's individual "network elements" on an unbundled basis (*unbundled access*); and (3) to sell to entrants at a wholesale rate any telecommunications service that the ILEC offers at retail to its own customers, so that the new entrant can resell it (*resale*). 47 U.S.C. §§ 251-52.

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[1] The court finds it unnecessary to hear oral argument due to the clarity of briefing, sufficiency of the record, and the similarity of most issues to cases decided by other courts.

This case contains many issues substantially similar or identical to two other cases involving U S West and the WUTC: *MCI Telecommunications Corp. v. U S West Communications, Inc.*, No. 97-1508R (consolidated); and *U S West v. Sprint Communications Co.*, No. 97-1764R. As a result, U S West and the WUTC each filed consolidated briefs for all three cases, and U S West's competitors collaborated on a single brief regarding standard and scope of review. The court has issued separate orders in the MCI and Sprint cases contemporaneously with this one.

The Act creates a multi-step process through which entrants to the local telephone market ("competing local exchange carriers" or "CLECs") gain use of the ILEC's network and services. First, both parties must negotiate. 47 U.S.C. §§ 251(c)(1), 252(a)(1). If negotiations stall, either party may petition the state utility commission for arbitration on the unresolved issues. Under the WUTC's procedure, when an impasse is reached, the arbitrator employs a modified "final offer" system: she will choose between the parties' last proposals; if they both conflict with the Act or WUTC policy, she will make a decision consistent with these requirements. Any final agreement, whether reached voluntarily or through arbitration, must be approved by the state commission. 47 U.S.C. § 252(e)(1).

AT&T and U S West seek review of their final agreement under 47 U.S.C. § 252(e)(6).[2]

(b) SCOPE AND STANDARD OF REVIEW

As to scope of review under 47 U.S.C. § 252(e)(6), the court confines consideration to the administrative record and will not hold a de novo proceeding. *See United States v. Bianchi & Co., Inc.*, 373 U.S. 709, 715 (1963); *see, e.g., GTE South Inc. v. Morrison*, No. 3:97CV493, slip op. at 6-7 (E.D. Va. May 19, 1998); *TCG Seattle*, slip op. at 3.

As to the standard of review, the parties agree that a state agency's legal interpretation of the Telecommunications Act is reviewed de novo. *See Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495 (9th Cir. 1997). This interpretation is not due deference as is a federal agency's under *Chevron U.S.A. Inc. v. Natural Resources Defense Counsel Inc.*, 467

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[2] Review of this final agreement extends necessarily to the underlying orders made by the WUTC throughout the arbitration period that became part of the agreement. *See U S West Communications, Inc. v. TCG Seattle*, No. C97-354WD, slip op. at 3 (W.D. Wash. Jan. 22, 1998) [hereinafter *TCG Seattle*].

U.S. 837, 843 (1984), because a state agency lacks the impetus, expertise and capability to harmonize federal law that a federal agency has. *See Orthopaedic Hosp.*, 103, F. 3d at 1495-96.

The WUTC's factual findings, however, will be reviewed as to whether they are arbitrary or capricious. *See MCIMetro Access Transmission Services Inc. v. GTE Northwest, Inc.*, No. C97-742WD, slip op. at 4 (W.D. Wash. July 7, 1998) [hereinafter *GTE Northwest*]. The Act authorizes the state commissions to hear evidence and set rates and schedules, subject to district court review of whether they have complied with the Act and FCC pronouncements. *See* 47 U.S.C. § 252(b)-(e); *Iowa Utilities Bd.*, 120 F.3d at 806.

If the district court finds invalid an aspect of the agreement, it will strike that portion and remand to the state commission for renegotiation. *See AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc.*, No. 5:97-CV-405-BR, slip op. at 15-16 (E.D. N.C. May 22, 1998) [hereinafter "*AT&T v. BellSouth*"].

(c) U S WEST'S CLAIMS

(1) Combining Unbundled Elements

Prices for unbundled access are "cost-based." 47 U.S.C. §§ 251(c)(3), 252(d)(1). Prices for resold services are "on the basis of retail rates charged to subscribers for the telecommunications service," minus the cost avoided by the ILEC of selling the service wholesale ("wholesale"). 47 U.S.C. § 252(d)(3). U S West argues that the AT&T agreement violated the Act by requiring it to combine unbundled network elements for sale at a "cost-based" price rather than at a "wholesale" price.[3] It is correct.

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[3] (*See* AT&T Agreement, Att. 3 ¶ 1.2.2 ("AT&T may purchase unbundled network Elements individually or in Combinations without

The Act provides: "An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows *requesting carriers to combine* such elements in order to provide such telecommunications service." 47 U.S.C. § 251(c)(3) (emphasis added). The Eighth Circuit interpreted this sentence to mean that "requesting carriers will combine the unbundled elements themselves." *Iowa Utilities Bd.*, 120 F.3d at 813. That is, while the Act requires ILECs to provide unbundled elements to CLECs, it could not be read "to levy a duty on the incumbent LECs to do the actual combining of elements." *Id.* The court clarified:

> Section 251(c)(3) requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to a combined) basis. Stated another way, § 251(c)(3) does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements) in order to offer competitive telecommunications services.

Id.

AT&T contends that U S West waived any challenge to the combining provisions because it did not raise this particular legal argument before the WUTC. U S West's omission is immaterial. The arbitrator applied an FCC interpretation of the law that has since been repudiated. This court need not refrain from applying the current law.

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restrictions as to how those elements may be rebundled."); *id.*, Att. 5 ¶ 3.2.15.1 ("AT&T may order and U S West shall provision unbundled Network Elements either individually or in any combination on a single order. Network Elements ordered as combined shall be provisioned as combined.").)

AT&T and the WUTC also argue that the court either lacks subject matter jurisdiction or should refrain from deciding this issue because U S West failed to exhaust the agreement's dispute resolution mechanism. Exhaustion of remedies is inapt here. First, the Act provides that "any party aggrieved" by a state commission's determination may bring a federal court action to determine whether an agreement contradicts the Act. The agreement's negotiation clause does not purport to deprive the court of this power, or purport to be a mandatory first step.

AT&T maintains that the dispute resolution provision has not been triggered because of the Supreme Court's grant of certiorari of the Eighth Circuit decision. This court will follow the existing precedent set by *Iowa utilities* and will not adopt a wait and see approach.

Substantively, AT&T and the WUTC contend that *Iowa Utilities* constrained only the FCC's authority to require combining, leaving it open for state commissions to order combining of network elements based upon independent state grounds and their rate-setting authority. *Iowa Utilities* cannot be read so narrowly. According to *Iowa Utilities*, requiring ILECs, at cost-based rates, to combined or not to separate already combined network elements violates the Act. *See Iowa Utilities Bd.*, 120 F.3d at 813; *see also GTE Northwest*, slip op. at 7-8.

The court vacates the requirements that U S West combine/restrain from separating network elements at cost-based rates, and remands to the WUTC to negotiate replacement language.

(2) Performance Standards

Section 251(c)(2)(C) provides that ILECs must provide interconnection "that is at least equal in quality to that provided by the local exchange carrier to itself . . . ." The Eighth Circuit explained that "this phrase mandates only that

the quality be equal -- not superior." *Iowa Utilities Bd.*, 120 F.3d at 812. U S West contends that the AT&T agreement requires it to meet technical standards on tight deadlines that exceed its standards for itself, thereby violating 47 U.S.C. § 251(c)(2)(C). This argument is unpersuasive.

First, U S West confuses requirements for the quality of interconnection with the timeliness for complying with such requirements. Section 251(c)(2)(C) addresses only the quality of interconnection, so any U S West complaints regarding timeliness and penalties for not meeting them have no merit.

Second, most of the provisions about which U S West complains were negotiated, not arbitrated.[4] Accordingly, the WUTC could reject such negotiated provisions only if they discriminated against a third-party telecommunications carrier or they were inconsistent with public policy. 47 U.S.C. § 252(e)(2)(A). The court finds that the WUTC properly accepted the agreement provisions.

Finally, U S West's other challenges to arbitrated provisions do not require superior quality interconnection.[5]

(3) Reciprocal Access to Poles, Ducts, Conduits, and Rights-of-way

Section 251(b)(4) provides that all local exchange carriers have "[t]he duty to afford access to the poles, ducts, conduits and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions *that are consistent with Section 224*." (emphasis added). U S West argues that because it is required to provide such access to AT&T, but AT&T is not required to

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[4] These include: AT&T Agreement, Part A ¶¶ 40.3.16-.18; AT&T Agreement, Att. 3, ¶¶ 3.1, 4.2.1.1, 4.4, 6.2.2, 7.2, 7.4.

[5] AT&T Agreement, Part A ¶¶ 51.3-51.4 require only that U S West make available to AT&T unused transmission media and dark fiber.

provide similar access to it, the agreement violates the Act. This is incorrect if one examines the cross-references Section 224.

Section 224(f)(1) provides that "[a] utility shall provide . . . any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." Section 224(a)(5), however, provides that "[f]or the purposes of this section, *the term 'telecommunications carrier' . . . does not include any incumbent local exchange carrier* as defined in Section 251(h)." U S West is an incumbent local exchange carrier as defined in Section 251(h); therefore, AT&T is not obligated to provide reciprocal access to U S West.[6] The WUTC did not err.

(4) Expanding Facilities

U S West argues that certain provisions require it to provide superior quality access to AT&T in violation of Section 251(c)(2)(C) because it must expand its facilities to accommodate competitors.[7] It also contends that the agreement improperly requires it to exercise eminent domain authority for the benefit of AT&T.[8] Because all

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[6] The FCC, whose opinion was not relied upon here, agrees. *See In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, FCC Docket No. 96-98, First Report and Order (August 8, 1996) ¶ 1231 [hereinafter *FCC Order*]. This paragraph was untouched by *Iowa Utilities*.

[7] The AT&T agreement provides: "U S WEST shall take all reasonable steps to expand its facilities to accommodate AT&T's request . . . . Before denying access based on lack of capacity, U S WEST must explore potential accommodations with AT&T." (AT&T Agreement, Part A ¶ 47.4.19.)

[8] U S West refers to language in the agreement that provides that it will exercise its eminent domain authority when necessary to expand an existing right-of-way over private property in order to accommodate a request for access to that right-of-way. (*See* AT&T Agreement, Part A ¶ 47.4.4.)

telecommunication providers can exercise eminent domain under Wash. Rev. Code 80.36.010, U S West argues that AT&T should be required to expand its own rights-of-way. These assertions lack merit.

First, such expansion does not create superior quality access; it creates equivalent access. Because U S West can expand its capacity to suit its needs, "[t]he principle of nondiscrimination established by section 224(f)(1) requires that it do likewise for telecommunications carriers . . . ." *FCC Order* ¶ 1162. The Eighth Circuit endorsed the FCC's statement that "the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements." *Iowa Utilities*, 120 F.3d at 813 n.33 (quoting *FCC Order* ¶ 198 (discussing technical feasibility)). The FCC declined to craft a rule categorically prescribing when a utility must expand an existing facility as requested versus when it may choose to decline due to infeasibility. *FCC Order* ¶ 1163. Nevertheless, it interpreted the Act "to require utilities to take all reasonable steps to accommodate requests for access in these situations. Before denying access based on a lack of capacity, a utility must explore potential accommodations in good faith with the party seeking access." *Id.* The WUTC relied upon the language of these valid FCC statements in approving these provisions.

Second, U S West bases its argument regarding its inability to exercise eminent domain on an imprecise interpretation of the law. Under state law, all telecommunications carriers indeed can exercise eminent domain. What's important is whether a competing carrier can have access to *U S West's* right-of-way, and consequently, U S West's existing network.

This court agrees with the WUTC's conclusions.

(5) Non-Reciprocal Reservation of Excess Capacity

U S West argues that it is forced to provide superior quality access because it must permit AT&T to reserve excess space on its poles, ducts, conduits, and is prevented from reserving such space for its own future use beyond emergency or maintenance spare. U S West is incorrect.

These agreement provisions exist to prevent U S West from discriminating in favor of itself:

> Permitting an incumbent LEC . . . to reserve space for local exchange service, to the detriment of a would-be entrant into the local exchange business, would favor the future needs of the incumbent LEC over the current needs of the new LEC. Section 224(f)(1) prohibits such discrimination among telecommunications carriers.

FCC Order ¶ 1170. The focus is on current use by AT&T, rather than speculative future use by U S West. After a confirmed request for space is made, U S West must reserve it for ninety days, within which time AT&T chooses whether to use or decline it. (AT&T Agreement, Part A ¶¶ 47.4.10, 47.4.20, 51.5) Quality is not the issue, parity is: the space either will be used or remain unused, not remain reserved for U S West indefinitely, unless safety dictates such a use.

The WUTC relied upon valid FCC proscriptions in approving these provisions.

(6) Collocation of Remote Switching Equipment

U S West argues that the requirement that it collocate AT&T's remote switching units (RSUs) is U S West's facilities violates the Act.[9] It is incorrect.

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[9] It refers to AT&T Agreement, Part A ¶¶ 40.1.5-.6. Collocation "enables a requesting telecommunications carrier to . . . [p]lace its own

Section 251(c)(6) provides that U S West has "[t]he duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier . . . ." The FCC defines "necessary" as "used" or "useful," not "indispensable." *FCC Order* ¶ 579. Thus, transmission equipment may be collocated and state commissions may designate additional types of equipment to be collocated. *FCC Order* ¶ 580. The FCC held:

> At this time, we do not impose a general requirement that switching equipment be collocated since it does not appear that it is used for the actual interconnection or access to unbundled network elements. We recognize, however, that modern technology has tended to blur the line between switching equipment and multiplexing equipment, which we permit to be collocated. We expect, in situations where the functionality of a particular piece of equipment is in dispute that *state commissions will determine whether the equipment at issue is actually used for interconnection or access to unbundled elements*.

FCC Order ¶ 581 (emphasis added).

The WUTC here determined that RSUs are equipment necessary for interconnection or access to unbundled network elements and that without RSUs CLECs would be at a technical and economic disadvantage in the transmission and routing of telephone service. (*See In re Petition for Arbitration of an Interconnection Agreement Between AT&T*

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equipment to be used for interconnection or access to unbundled network elements within or upon an incumbent LEC's premises." 47 C.F.R. § 51.5.

Communications of the Pacific Northwest, Inc. and U S West Communications, Inc., WUTC, Commission Order Modifying Arbitrator's Decision and Arbitrator's Recommendations, and Approving Interconnection Agreement with Modifications, Docket No. UT-960309 (July 11, 1997), at 10 [hereinafter "AT&T Approval Order"].) The WUTC distinguished between RSUs and fully equipped switching equipment. (*See id.*) This determination was neither arbitrary nor capricious, was based on sufficient evidence, and was within the WUTC's discretion to decide.

(7) Unbundling of Dark Fiber

U S West challenges the requirements that it provide AT&T with "dark fiber" as an unbundled network element. Dark fiber is "fiber-optic cable that has been laid into a telecommunications provider's network but which is not 'lit' by electronics on either end of the cable, or at least not by electronics provided by the local carrier. No switches are routing digital impulses onto this fiber and it consequently carries no information." *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, No. 5:97-CV-425-BR, slip op. at 6 (E.D.N.C. May 22, 1998) [hereinafter "*MCI v. BellSouth*"]. A "network element" is "a facility or equipment used in the provision of a telecommunications service," which includes "features, functions, and capabilities" provided by such facilities. 47 U.S.C. § 153(29). The FCC declined to address whether dark fiber should be unbundled as a network element because it lacked a sufficient record to decide. *FCC Order* ¶ 450. States may impose additional unbundling requirements so long as such requirements are consistent with the Act and FCC regulations. *Id.* at ¶ 244.

This is a two-step inquiry: (1) is dark fiber a network element; (2) if so, should it be unbundled? U S West argues first that "dark fiber" is not a network element because it is not actively "used" in the provisions of telecommunications services. Alternatively, it argues that because dark fiber is

proprietary, AT&T must show a heightened need to use it. U S West's interprets "network element" too narrowly and has not shown that dark fiber should not be unbundled.

Dark fiber is a physical component that, if lit, undoubtedly would be a network element. The fiber is not on spools in a warehouse, it is already in the ground as part of a network, awaiting only an LEC's desire to attach the proper equipment. U S West's distinction is, therefore, purely temporal. It argues that "used" means only "currently used," not used in the sense of "employed for some purpose." Because the Act's does not specify a particular, technical definition of "used," such preciseness should not be implied.

In *MCI v. BellSouth*, slip op. at 6, the Eastern District of North Carolina found dark fiber to be a network element, vacating the state commission's order to the contrary. It relied on construing "network element" broadly, in the spirit of *Iowa Utilities*, and previous FCC language that dark fiber service was "wire communication." *Id.* at 6-9. Its reasoning is persuasive.

If a state commission determines that it is technically feasible for an ILEC to provide access to an unbundled network element, the commission may decline to require unbundling only if: (1) the network element is proprietary and the CLEC could provide the same service by using nonproprietary elements; or (2) failure to provide access "would not decrease the quality of, and would not increase the financial or administrative cost of, the telecommunications service" a CLEC seeks to offer. 47 C.F.R. § 51.317(b); *see* 47 U.S.C. § 251(c)(3), 251(d)(2). The burden is upon the ILEC to prove that an element is proprietary. *FCC Order* ¶ 283.

U S West argues for the first time that dark fiber is proprietary because revealing the existence of "dark fiber" shows its business plan for expansion. This argument is inapposite. Whether an element is proprietary is a factual,

not a legal, question. U S West provided no evidence before the WUTC that dark fiber was proprietary and therefore never satisfied its burden of proof.

AT&T, on the other hand, presented evidence that denying it access to dark fiber would decrease the quality and increase the cost of providing services. (*See* AT&T Record, at 5231-32 (Testimony of John P. Lynott) .)

The WUTC did not err legally nor act arbitrarily or capriciously.

(8) Pricing Claims

U S West contends that the WUTC approved prices, terms, and conditions that unjustly denied U S West adequate compensation.[10] The court reviews de novo whether the WUTC employed a methodology that, as a matter of law, violates the Act. The court reviews whether the WUTC's fact-finding, including choice of methodology, was arbitrary or capricious.

1. Unbundled Loop Prices

Simply stated, a local loop is the portion of the network that connects the customer with the network. The state commission determines whether the rates, terms, and conditions for such unbundled elements are just and reasonable. 47 U.S.C. §§ 251(c)(3), 252(d)(1). This determination is "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element," must be nondiscriminatory, and "may include a reasonable profit." 47 U.S.C. § 252(d)(1)(A).

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[10] The prices set in the agreement and approved by the WUTC are interim prices: they are subject to change during the WUTC's generic price and cost proceeding.

The parties acknowledge that this means that price should be based on the forward-looking, i.e., incremental, costs of providing the element rather than on historic or embedded costs, and that the WUTC should, therefore, employ a TELRIC ("Total Element Long Run Incremental Cost") methodology. See *FCC Order* ¶ 678 (describing TELRIC). They disagree about which TELRIC model was better. The arbitrator accepted AT&T's "Hatfield model," which produced a price of $11.33, and rejected U S West's independent cost study, which produced a price of $36.20.

The choice of the Hatfield model was neither legal error nor arbitrary or capricious. In a pre-Act proceeding, the WUTC approved an earlier version of the Hatfield model. *See Washington Utilities and Transportation Comm'n v. U S West Communications, Inc.*, WUTC , Fifteenth Supplemental Order, Docket No. UT-950200, slip op. at 86 (April 11, 1996), *aff'd, U S West Communications, Inc. v. Washington Utilities and Transportation Comm'n*, 134 Wash. 2d 74 (1997). The FCC specified the Hatfield model as the kind of generic, forward-looking model that best comports with TELRIC principles. *FCC Order* ¶ 834.

The WUTC found U S West's proposed cost studied less reliable. While the Hatfield model used inputs consistent with inputs the commission had found to be reasonable, U S West's cost studies used unverifiable cost data, inputs that were inconsistent with the WUTC's rate order, and excessive allocation of costs that appeared to be an attempt to recover embedded costs. (*See In re Petition for Arbitration of an Interconnection Agreement Between AT&T Communications of the Pacific Northwest, Inc. and U S West Communications, Inc.*, WUTC, Arbitrator's Report and Decision, Docket No. UT-960309 (Nov. 27, 1996), at 43-44 [hereinafter "First AT&T Arbitration Order"].)

U S West argues nonetheless that the WUTC behaved arbitrarily and capriciously because it relied upon improper prices for inputs. In support, U S West points to the evidence

that it presented to the arbitrator. This is an attack on the choice of the Hatfield model, and an attempt to retry the facts.[11] While conflicting interpretations of the evidence exist, none of the arbitrator's choices are arbitrary or capricious.

2. Customer Transfer Charge

U S West challenges the $5.00 customer transfer charge selected by the AT&T arbitrator and approved by the WUTC. It had proposed $55.00. This charge is a nonrecurring fee paid to U S West to compensate it for transferring its customer to a competitor's service or for transferring a customer from one competitor to another. The FCC concluded that states should determine reasonable and discriminatory rates for such charges. *FCC Order* ¶ 970.

The arbitrator relied upon testimony by AT&T that U S West's estimates for nonrecurring charges were excessive and difficult to verify. (*See In Re Petition for Arbitration of an Interconnection Agreement Between AT&T Communications of the Pacific Northwest, Inc. and U S West Communications, Inc.*, WUTC, Arbitrator's Supplemental Order, Docket No. UT-960309 (Jan. 16, 1997), at 3 (citing AT&T Record 5641). In light of this lack of reliable information, he found that AT&T's figure, which was the same rate for transferring long-distance customers to different companies, to be a reasonable proxy on an interim basis. *Id.* This was not arbitrary or capricious.

3. One Point of Interconnection Per LATA

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[11] Earlier, this court struck a U S West affidavit, the primary purpose of which was to criticize the Hatfield model. That the Hatfield model may be improving with time is no indication that the WUTC either chose it improperly or that the inputs should now be revised for this interim price proceeding.

U S West challenges the WUTC's determination that AT&T may establish a single point of interconnection ("POI") per Local Access Transport Area ("LATA"). U S West contends that the Act requires a CLEC to have a POI in each local calling area in which that CLEC offers local service and that the present plan compensates U S West inadequately. It is wrong.

Under the Act, a new entrant may interconnect with the ILEC's facilities "at any technically feasible point." 47 U.S.C. § 251(c)(2); *see FCC Order* ¶ 209. The ILEC is relieved of this duty to provide interconnection at a particular point only if it proves to the state commission that interconnection at that point is not technically feasible. 47 C.F.R § 51.305(e). U S West does not contest that such a connection is technically feasible. The WUTC properly declined to consider the cost of a single POI per LATA because "[a] determination of technical feasibility does not include consideration of economic, accounting, [or] billing . . . concerns." 47 C.F.R. § 51.5; *see U S West Communications, Inc. v. MFS Intelenet, Inc.*, No. C97-222WD, slip op. at 9 (W.D. Wash. Jan. 7, 1998) (reaching same conclusion for same reasons) [hereinafter "*MFS Intelenet*"].

4. "Bill and Keep" Compensation

U S West contends that the interim "bill and keep" arrangement adopted by the WUTC in the AT&T agreement violates the Act because it provides for inadequate cost recovery. It is wrong.

Compensation provisions must "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination" of calls that originate on the other carrier's network facilities. 47 U.S.C. § 252(d)(2)(A)(i). An agreement may "afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual

recovery (such as bill-and-keep arrangements)." 47 U.S.C. § 252(d)(2)(B)(i). In an independent proceeding, the WUTC approved of bill and keep as a method of reciprocal compensation. *See WUTC v. U S West Communications, Inc.*, WUTC, Fourth Supplemental Order, Docket No. 941464, slip op. at 29-32 (Oct. 31, 1995) [hereinafter "*Fourth Supplemental Order*"]. Similarly, the FCC found that a state may impose a bill and keep arrangement when neither party can rebut the presumption that traffic between carriers is balanced. *FCC Order* ¶ 1111-13.

U S West never rebutted the presumption that traffic was balanced with anything other than conclusory statements. (*See* AT&T Record 6079-80, 6286-92, 6305-07; AT&T Transcript 657-58.) In consideration of this, and that U S West's proposed alternative was previously found to be inferior, *see Fourth Supplemental Order*, slip op. at 28, the WUTC did not act arbitrarily or capriciously by choosing bill and keep because it is consistent with the Act, WUTC policy, and FCC statements. *See TCG Seattle*, slip op. at 7 (approving bill and keep because permitted by Act, approved in independent WUTC proceeding, and approved by FCC).

5. Construction and Conditioning Charges on Local Loops

U S West challenges two aspects of the AT&T agreement. It argues that: (1) U S West must "make changes to its network facilities, services and operations to provide interconnection and unbundled elements" upon request, which means providing "superior services"; and (2) the WUTC failed to require AT&T to pay conditioning charges for the local loop. Both contentions lack merit.

First, U S West improperly proposes that this is a "superior access" issue; this is a question of equivalent access for resale services. U S West is providing AT&T no more than it provides itself: local loop for an end user. AT&T must pay for construction the same charges that apply to a

similarly situated U S West retail end user pursuant to U S West's retail tariffs. (*See* AT&T Agreement, Att. 1, at ¶ 3.1.) Modification of an ILEC's facilities to accommodate interconnection or access to network facilities, as it is required here, is contemplated by the Act. *See Iowa Utilities Bd.*, 120 F.3d at 813 n. 33.

Second, the WUTC did not act arbitrarily or capriciously when it rejected conditioning costs for local loops. In both cases, U S West provided no evidence that the cost of conditioning wasn't already included in the TELRIC price of a conditioned loop. (*See*, First AT&T Arbitration Decision, at 47.) As in *U S West Communications v. TCG Seattle*, "U S West presented no evidence of the actual costs of making changes to its network . . . . The arbitrator noted that U S West did not state in its proposal what is involved in conditioning, why a charge is needed, or how much the charge should be." *TCG Seattle*, slip op. at 6.

(9) Compensation for Interim Number Portability

Number portability enables users who switch telephone companies to retain the same telephone number. *See* 47 U.S.C. § 153(30). Until a permanent number portability system is developed, an ILEC must provide number portability using interim methods. U S West uses "remote call forwarding," in which a call to a competitor's customer dialed to the customer's old U S West number will be switched and forwarded to the competitor's number.

The Act provides that the costs of establishing number portability "shall be borne by all telecommunications carriers on a competitively neutral basis *as determined by the* [*FCC*]." 47 U.S.C. § 251(e)(2) (emphasis added). U S West contends that the AT&T agreement fails to compensate it for the costs of providing interim number portability. It is incorrect because the agreement is consistent with the Act and with binding FCC orders.

U S West says that the WUTC erred by allocating the costs of number portability in the AT&T agreement based on the amount of active local numbers each carrier has rather than on the number of calls actually forwarded. The FCC explicitly authorized allocation of cost recovery based on the number of active lines. *Telephone Number Portability, First Report and Order and Further Notice of Proposed Rulemaking*, 11 F.C.C.R. 8352, at ¶ 136 (1996). It specifically rejected the kind of plan proposed by U S West because it would impose the full cost of number portability on new entrants. *Id.* at ¶ 138; *see also TCG Seattle*, slip op. at 9 (rejecting same U S West contentions).

(10) Due Process

U S West contends that the WUTC violated its due process rights because its decisions were not based on evidence in the record. The record refutes this contention.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976). This was provided here. If the WUTC made errors, the errors were legal and not of constitutional magnitude. All its determinations were based on adequate evidence and none of its decisions were arbitrary or capricious. *See TCG Seattle*, slip op. at 10 (denying U S West's due process claim).

(11) Taking

U S West argues that the WUTC's approval of the agreement amounts to an unconstitutional taking. As Judge Dwyer noted:

> A taking claim under the United States Constitution is not ripe until (a) there is a final decision by the state regarding the property; and (b) the plaintiff has attempted to obtain just compensation for the property in state court.

Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186-97 (1985).

TCG Seattle, slip op. at 10. These requirements have not been met here. U S West's taking claim is dismissed without prejudice.

Because this claim is identical to the ones disposed of in *GTE Northwest*, *TCG Seattle*, and *MFS Intelenet*, U S West now argues that it is not seeking compensation for a taking; it is seeking declaratory and injunctive relief to *prevent* a taking, "to demonstrate that its property may not be invaded and that it may not be required to provide access to its property on a below-cost basis." (U S West Motion for Summary Judgment, at 81.) This is circular. The Fifth Amendment provides that property cannot be taken "without just compensation." U S West's claim is still not ripe because the WUTC has not set permanent prices and U S West has not sought compensation in state court. Moreover, the court has found none of the interim price determinations to be arbitrary or capricious.

(d) AT&T'S SHARED TRANSPORT CLAIM

AT&T contends that the Act requires that "shared transport" be offered as an unbundled network element. "Shared transport" is a function performed by interoffice transmission facilities in an ILEC's network. AT&T seeks to share (with other CLECs and U S West) the capacity to transport calls between U S West end offices directly, rather than having the calls routed through an extra "tandem" switch, or purchasing more costly "dedicated" transport.

As mentioned earlier, a "network element" includes features, functions, and capabilities of any facilities that are used to provide telephone service. 47 U.S.C. §§ 153(29). The FCC is authorized to determine that network elements must be unbundled. 47 U.S.C. § 251(d)(2); *see Iowa Utilities Bd.*, 120 F.3d at 802 n. 23. It determined that network

elements include shared transport. *FCC Order* ¶ 440-41. These FCC determinations were untouched by the Eighth Circuit. *See Iowa Utilities Bd.*, 120 F. 3d at 808-810, 818 n.38.

The FCC regulations define "shared transport" as "transmission facilities shared by more than one carrier, including the incumbent LEC, between end office switches, between end office switches and tandem switches, and between tandem switches, in the incumbent LEC network." 47 C.F.R. § 51.319(d)(1)(ii). This description was clarified by another FCC order: "[T]he obligation of incumbent LECs to provide requesting carriers with access to shared transport extends to all incumbent LEC interoffice transport facilities, and not just to interoffice facilities between an end office and a tandem." *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Third Order on Reconsideration and Further Notice of Proposed Rulemaking, CC Docket No. 96-98, 12 F.C.C.R. 12460 (Aug. 18, 1997), at ¶ 25.

The arbitrator did not permit AT&T access to shared transport because he thought the issue too complex and evidence-intensive to resolve during post-arbitration proceedings. (*See In re Petition for Arbitration of an Interconnection Agreement Between AT&T Communications of the Pacific Northwest, Inc. and U S West Communications, Inc.*, WUTC, Arbitrator's Report and Recommendations, Docket No. UT-960309 (June 6, 1997), at 24.) The WUTC declined to do so for the same reason, and noted that the Bona Fide Process for Further Unbundling (BFR) process should be used. (*See* AT&T Approval Order, at 12.)

The WUTC and U S West argue that AT&T should be procedurally barred from raising this issue outside of the BFR process because it sought shared transport too late. This argument is unpersuasive because the question is legal, not factual: is shared transport a network element subject to unbundling? The court concludes that it is.

The BFR process provides an *alternative* process in which a CLEC can gain additional, not-yet-specified elements. Here, shared transport was a specified network element, so no alternative process need be invoked.

U S West also argues that shared transport is a service rather than a network element. This is irrelevant because capabilities may be offered simultaneously as services *or* unbundled elements. *Iowa Utilities Bd.*, 120 F.3d at 809.

(e) WUTC'S CLAIMS

The WUTC moved for summary judgment on issues that U S West has decided not to pursue. (U S West Summary Judgment Motion, at 41 n.30.) These issues are moot.

(f) CONCLUSION

The summary judgment motions of AT&T, U S West, and the WUTC are granted in part and denied in part in the ways set forth above. U S West's taking claim is dismissed without prejudice. As these rulings dispose of the case, judgment will be entered accordingly. No party will recover costs.

The clerk is directed to send copies of this order to all counsel of record.

DATED at Seattle, Washington this 21st day of July, 1998.

BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C97-1764R

U S WEST COMMUNICATIONS, INC.,

Plaintiff,

v.

SPRINT COMMUNICATIONS CO., L.P., et al.,

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART CROSS-MOTIONS FOR SUMMARY JUDGMENT

U S West Communications, Inc. ("U S West") brought this action pursuant to the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 252(e)(6), for judicial review of an agreement approved by the Washington Utilities and Transportation Commission ("WUTC") concerning interconnection between U S West and Sprint Communications Co., L.P. ("Sprint"). Sprint seeks to compete in the local telecommunications market. The defendants are Sprint and the WUTC and its commissioners. The FCC has filed a brief *amicus curiae*.

All parties have moved for summary judgment. U S West asserts that certain terms of the agreement are inconsistent with Sections 251 and 252 of the Act, with *Iowa Utilities Bd. v. FCC*, 120 F. 3d 753 (8th Cir. 1997), *cert. granted, AT&T v. Iowa Utilities Bd.*, 118 S. Ct. 879 (1998),

and with FCC regulations. The court has fully considered all the papers filed. Because there is no genuine issue of material fact for trial, the case will be decided as a matter of law pursuant to Federal Rule of Civil Procedure 56.[1]

(g) BACKGROUND

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of Title 47, United States Code), was "designed, in part, to erode the monopolistic nature of the local telephone service industry by obligating the current providers of local telephone service . . . to facilitate the entry of competing companies into local telephone service markets across the country." *Iowa Utilities Bd.*, 120 F.3d at 791. Specifically, the Act forces an incumbent local exchange carrier ("ILEC") (1) to permit new entrants to interconnect with the ILEC's existing network (*interconnection*); (2) to provide entrants access to the ILEC's individual "network elements" on an unbundled basis (*unbundled access*); and (3) to sell to entrants at a wholesale rate any telecommunications service that the ILEC offers at retail to its own customers, so that the new entrant can resell it (*resale*). 47 U.S.C. §§ 251-52.

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[1] The court finds it unnecessary to hear oral argument due to the clarity of briefing, sufficiency of the record, and the similarity of most issues to cases decided by other courts.

This case contains certain issues substantially similar or identical to two other cases involving U S West and the WUTC: *U S West Communications, Inc. v. AT&T Communications of the Northwest, Inc.*, No. 97-1320R (consolidated); and *MCI Telecommunications Corp. v. U S West Communications, Inc.*, No. 97-1508R (consolidated). As a result, U S West and the WUTC each filed consolidated briefs for all three cases, and U S West's competitors collaborated on a single brief regarding standard and scope of review. The court has issued separate orders in the MCI and Sprint cases contemporaneously with this one.

The Act creates a multi-step process through which entrants to the local telephone market ("competing local exchange carriers" or "CLECs") gain use of the ILEC's network and services. First, both parties must negotiate. 47 U.S.C. §§ 251(c)(1), 252(a)(1). If negotiations stall, either party may petition the state utility commission for arbitration on the unresolved issues. Under the WUTC's procedure, when an impasse is reached, the arbitrator employs a modified "final offer" system: she will choose between the parties' last proposals; if they both conflict with the Act or WUTC policy, she will make a decision consistent with these requirements. Any final agreement, whether reached voluntarily or through arbitration, must be approved by the state commission. 47 U.S.C. § 252(e)(1).

Sprint and U S West seek review of their final agreement under 47 U.S.C. § 252(e)(6).[2]

(h) SCOPE AND STANDARD OF REVIEW

As to scope of review under 47 U.S.C. § 252(e)(6), the court confines consideration to the administrative record and will not hold a de novo proceeding. *See United States v. Bianchi & Co., Inc.*, 373 U.S. 709, 715 (1963); *see, e.g., GTE South Inc. v. Morrison*, No. 3:97CV493, slip op. at 6-7 (E.D. Va. May 19, 1998); *TCG Seattle*, slip op. at 3 [hereinafter *TCG Seattle*].

As to the standard of review, the parties agree that a state agency's legal interpretation of the Telecommunications Act is reviewed de novo. *See Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495 (9th Cir. 1997). This interpretation is not due deference as is a federal agency's under *Chevron*

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[2] Review of this final agreement extends necessarily to the underlying orders made by the WUTC throughout the arbitration period that became part of the agreement. *See U S West Communications, Inc. v. TCG Seattle*, No. C97-354WD, slip op. at 3 (W.D. Wash. Jan. 22, 1998) [hereinafter "*TCG Seattle*"].

U.S.A. Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837, 843 (1984), because a state agency lacks the impetus, expertise and capability to harmonize federal law that a federal agency has. *See Orthopaedic Hosp.*, 103 F.3d at 1495-96.

The WUTC's factual findings, however, will be reviewed as to whether they are arbitrary or capricious. *See MCIMetro Access Transmission Services, Inc. v. GTE Northwest, Inc.*, No. C97-742WD, slip op. at 4 (W.D. Wash. July 7, 1998) [hereinafter GTE Northwest]. The Act authorizes the state commissions to hear evidence and set rates and schedules, subject to district court review of whether they have complied with the Act and FCC pronouncements. *See* 47 U.S.C. § 252(b)-(e); *Iowa Utilities Bd.*, 120 F.3d at 806.

If the district court finds invalid an aspect of the agreement, it will strike that portion and remand to the state commission for renegotiation. *See AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc.*, No. 5:97-CV-405-BR, slip op. at 15-16 (E.D.N.C. May 22, 1998) [hereinafter "*AT&T v. BellSouth*"].

(i) U S WEST'S CLAIMS

(1) Combining Unbundled Elements

Prices for unbundled access are "cost-based." 47 U.S.C. §§ 251(c)(3), 252(d)(1). Prices for resold services are "on the basis of retail rates charged to subscribers for the telecommunications service," minus the cost avoided by the ILEC of selling the service wholesale ("wholesale"). 47 U.S.C. § 252(d)(3). U S West argues that the Spring agreement violated the Act by requiring it to combine unbundled network elements for sale at a "cost-based" price rather than at a "wholesale" price.[3] It is correct.

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[3] In an arbitrated provision, the Sprint agreement provides:

The Act provides: "An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows *requesting carriers to combine* such elements in order to provide such telecommunications service." 47 U.S.C. § 251(c)(3) (emphasis added). The Eighth Circuit interpreted this sentence to mean that "requesting carriers will combine the unbundled elements themselves." *Iowa Utilities Bd.*, 120 F.3d at 813. That is, while the Act requires ILECs to provide unbundled elements to CLECs, it could not be read "to levy a duty on the incumbent LECs to do the actual combining of elements." *Id.* The court clarified:

> Section 251(c)(3) requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to a combined) basis. Stated another way, § 251(c)(3) does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements) in order to offer competitive telecommunications services.

Id.

Sprint and the WUTC argue that the court either lacks subject matter jurisdiction or should refrain from deciding this issue because U S West failed to exhaust the agreement's

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> U S WEST agrees to perform and Sprint agrees to pay for the TELRIC costs of the functions necessary to combine requested elements in any technically feasible manner either with other elements from U S WEST's network, or with elements possessed or arranged for by Spring. However, U S WEST need not combine network elements in any manner requested if not technically feasible, but must combine elements ordinarily combined in its network in the manner they are typically combined.
>
> (Sprint Agreement ¶ 32.1.2.)

dispute resolution mechanism. Sprint also says that deciding this issue would undermine negotiations in which the parties are presently engaged.

Exhaustion of remedies is inapt here. First, the Act provides that "any party aggrieved" by a state commission's determination may bring a federal court action to determine whether an agreement contradicts the Act. The agreement's negotiation clause does not purport to deprive the court of this power, or purport to be a mandatory first step. *See AT&T v. BellSouth*, slip op. at 18 n. 3 ("[T]his court is not bound by any renegotiation agreement between the parties and is not constrained to adopt the parties' 'wait and see' approach.").

Second, the court does not undermine negotiations by applying the law; it clarifies the law's scope. In the absence of a clear legal pronouncement, the parties lack sufficient guidelines for productive negotiations to proceed.

Requiring ILECs, at cost-based rates, to combine or not to separate already combined network elements violates the Act. *See Iowa Utilities Bd.*, 120 F. 3d at 813; *see also GTE Northwest*, slip op. at 7-8. The court vacates such requirements and remands to the WUTC to negotiate replacement language.

(2) Compensation for Interim Number Portability

Number portability enables users who switch telephone companies to retain the same telephone number. *See* 47 U.S.C. § 153(30). Until a permanent number portability system is developed, an ILEC must provide number portability using interim methods. U S West uses "remote call forwarding," in which a call to a competitor's customer dialed to the customer's old U S West number will be switched and forwarded to the competitor's number.

The Act provides that the costs of establishing number portability "shall be borne by all telecommunications carriers

on a competitively neutral basis *as determined by the* [*FCC*]." 47 U.S.C. § 251(e)(2) (emphasis added). U S West contends that the Sprint agreement fails to compensate it for the costs of providing interim number portability. It is incorrect because the agreements are consistent with the Act and with binding FCC orders.

"Access charges" are fees paid by long distance carriers to compensate LECs for transporting long-distance calls over the LEC's network in order to complete the calls. U S West says that the Spring agreement unfairly allocates access charge revenues.[4]

The FCC approved the kind of "meet point" billing arrangement found in the Sprint agreement. *FCC Number Portability Order* ¶ 140. To the extent that U S West challenges the exact division of revenues, the arbitrator did not act arbitrarily or capriciously, especially because U S West already receives compensation for remote call

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[4] The Spring agreement provides:

> Terminating access charges will be billed by each Party according to the Parties' respective tariffs to IXCs [long distance carriers] by the receiving local exchange carriers according to the resulting final ruling in [*Telephone Number Portability*, First Report and Order and Further Notice of Proposed Rulemaking, 11 F.C.C.R. 8352, at ¶ 140 (1996) [hereinafter "*FCC Number Portability Order*"]] as follows:
>
> > The companies will establish a meet point relationship.
> >
> > Sprint will receive the end office charges (local switching), CCL and termination charges.
> >
> > Transportation will be shared by the companies and charged on a meet point basis to the ultimate end user switch on a percent of route miles provided.
> >
> > Tandem switching will be recovered by U S WEST along with entrance facility charges.
>
> (Spring Agreement ¶ 9.1.10).

forwarding through a separate charge, which was agreed upon through negotiation. (*See In re Petition for Arbitration of an Interconnection Agreement Between Sprint Communications Co., L.P. and U S West Communications, Inc.*, WUTC, Arbitrator's Report and Decision, Docket No. UT-960347 (Jan. 15, 1997), at 4); *see also U S West Communications, Inc. v. MFS Intelenet, Inc.*, No. C97-222WD, slip op. at 8 (W.D. Wash. Jan. 7, 1998) (approving of shared division of access charges and rejecting same U S West contentions) [hereinafter "*MFS Intelenet*"].

(3) Taking

U S West argues that the WUTC's approval of the agreement amounts to an unconstitutional taking. As Judge Dwyer noted:

> A taking claim under the United States Constitution is not ripe until (a) there is a final decision by the state regarding the property; and (b) the plaintiff has attempted to obtain just compensation for the property in state court. *Williamson Planning Comm'n v Hamilton Bank*, 473 U.S. 172, 186-97 (1985).

TCG Seattle, slip op. at 10. These requirements have not been met here. U S West's taking claim is dismissed without prejudice.

Because this claim seems identical to the ones disposed of in *GTE Northwest*, *TCG Seattle*, and *MFS Intelenet*, U S West now argues that it is not seeking compensation for a taking; it is seeking declaratory and injunctive relief to *prevent* a taking, "to demonstrate that its property may not be invaded and that it may not be required to provide access to its property on a below-cost basis." (U S West Motion for Summary Judgment, at 81.) This is circular. The Fifth Amendment says that property cannot be taken "without just compensation." U S West's claim is still not ripe because the

WUTC has not set permanent prices and U S West has not sought compensation in state court. Moreover, the court has found none of the interim price determinations to be arbitrary or capricious.

(j) CONCLUSION

The summary judgment motions of Sprint, U S West, and the WUTC are granted in part and denied in part in the ways set forth above. U S West's taking claim is dismissed without prejudice. As these rulings dispose of the case, judgment will be entered accordingly. No party will recover costs.

The clerk is directed to send copies of this order to all counsel of record.

DATED at Seattle, Washington this 21st day of July, 1998.

BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

APPENDIX G

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DOCKET NO. UT-960310

In the Matter of the Petition for Arbitration of an Interconnection Agreement Between

MCImetro Access Services, Inc. ("MCIm")
and
U S WEST Communications, Inc. ("USWC")

Pursuant to 47 U.S. C. Section 252.

COMMISSION ORDER APPROVING INTERCONNECTION AGREEMENT

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II. ARBITRATION ISSUES

A. Issue 9: Collocation of Remote Switching Units (MCIm)

MCI's Request. MCIm asks the Commission to reverse the Arbitrator and allow collocation of Remote Switching Units (RSUs).

Report & Decision (at 38-39). The Arbitrator concluded that collocation of RSUs was not "necessary" under 47 U.S.C.251(c)(6). The analysis focused the need for RSUs in light of alternatives which do not include switching functions. Under that decision-making approach, the Arbitrator concluded that adequate alternatives existed.

[PAGE 5]

MCI's Argument. In Docket No. UT-960309, the commission followed a Staff recommendation and allowed AT&T to collocate RSUs. Staff's analysis is persuasive and consistent with MCI's position, and the evidence, in this docket. This is a matter which the FCC left to the states. It is the most efficient and economical way to achieve line concentration.

USWC's Argument. RSUs are primarily switches and USWC need not collocate them.

Decision-Making Standard. The FCC rules contemplate a two step analysis:

Necessity. 47 C.F.R. 51.5 defines "necessary" in terms of usefulness rather than necessity. There is no need for the CLEC to show an absence of alternatives.

Functionality. 47 C.F.R. 51.323(c) requires a finding that the equipment is not a switch.

Discussion. Collocation of remote switching units ("RSUs") is "useful" for interconnection under 47 C.F.R. 51.5 because RSUs provide line and trunk connections. A RSU is not a "switch" under 47 C.F.R. 51.323(c) because it requires a host to perform essential functions, including:

- Programming to define lines and trunks;
- Routing;
- Creation and use of engineering and billing data;
- Access to OSS systems (*e.g.* maintenance monitoring, engineering data, and recent changes); and
- SS7 signaling.

Even when a RSU has "stand-alone" capabilities, it needs its "umbilical cord" to the host for full switching functionality. In the stand-alone mode, it can only:

- Perform functions which the host has downloaded to the RSU for processing in the RSU;
- Route calls "internally" between lines attached to the RSU;
- Store some rudimentary engineering and billing data for subsequent uploading to the host; and
- Use rudimentary internal non-SS7 signaling.

While a RSU is not a switch, it can perform some functions which could enable a CLEC to avoid access charges. A CLEC may not use physically collocated RSUs to avoid payment of access charges.

[PAGE 6]

Conclusion. The Commission adopts MCI's contract language relating to collocation of RSUs.

B. Issue 40: Wholesale Discount (MCIm)

MCI's Request. MCIm asks the Commission to reject the Arbitrator's 13.96% discount in favor of MCI's 22.56% figure.

Report & Decision (at 16). The Arbitrator found problems with USWC's cost model, and MCI's data, which prevented him from fully adopting either party's proposal. He adopted the MCIm cost model and made some of the adjustments which USWC proposed.

MCI's Argument. The Arbitrator adopted an "issue-by-issue best and final offer" approach to the arbitration to encourage parties to adopt reasonable positions. He should have adopted MCI's 22.56% wholesale discount because he selected the Hatfield model and MCI's discount figure was not an extreme offer. By making adjustments, he allowed USWC to circumvent the process by inviting adjustment to 13.96% while retaining the possibility that the Arbitrator would adopt its "best" offer.

Even if it was appropriate to make selective adjustments, USWC did not propose adjustments when MCIm made conservative assumptions in USWC's favor and did not propose other adjustments to ensure internal consistency in the Hatfield model. The process of finding the "right" number for each cost study component requires a proceeding like the generic cost proceeding rather than the truncated process for arbitrations under the Act.

Discussion. The baseball arbitration model which the Commission adopted for these cases does not prevent the Arbitrator from crafting a solution when neither party's offer is acceptable. While some of MCI's assumptions may have conservatively favored USWC, it would not have been appropriate to adopt MCI's offer knowing that it was over 1-1/2 times the figure which appeared to be correct.

Conclusion. The Commission adopts the Arbitrator's Report & Decision on this issue.

APPENDIX H

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DOCKET NO. UT-960309

In the Matter of the Petition for Arbitration of an Interconnection Agreement Between

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC. and U S WEST COMMUNICATIONS. INC.

Pursuant to 47 U.S.C. Section 252.

COMMISSION ORDER MODIFYING ARBITRATOR'S DECISION AND ARBITRATOR'S RECOMMENDATIONS, AND APPROVING INTERCONNECTION AGREEMENT WITH MODIFICATIONS

MEMORANDUM

I. Procedural History

On March 1, 1996, AT&T Communications of the Pacific Northwest, Inc. ("AT&T") requested negotiations with U S WEST Communications, Inc. ("USWC") for an agreement relating to interconnection under terms of the Telecommunications Act of 1996, Public Law No. 104-104, 101 Stat. 56, codified at 47 U.S.C. Sec, 151 ff. (1996). In this decision we will refer to the law simply as "the Act" or as "the Telecom Act."

On July 25, 1996, AT&T filed with the Commission and served on USWC a petition for arbitration pursuant to 47 U.S.C. Sec. 252(b)(1). The petition was designated Docket No. UT-960309. On August 5, 1996, the Commission entered an Order on Arbitration Procedure appointing an arbitrator for the proceeding and establishing procedures. A hearing was held before Mr. Simon J. Ffitch, Arbitrator, on October 21 and 22, 1996, at Olympia, Washington. AT&T was represented by Dan Waggoner, Patricia Raskin, and Susan Proctor, attorneys at law. USWC was represented by Edward T. Shaw, Lisa Anderi, and Doug Owens. attorneys at law. Following the hearing, the parties filed final briefs and final or 'last best" offers on November 5, 1996.

On November 27, 1996, an Arbitrator's Report and Decision ("Decision") was issued in this docket. On December 6, 1996, AT&T filed a Petition for Partial Reconsideration of Arbitrator's Report and Decision. The arbitrator agreed to review the Decision to correct errors of fact or law, or ministerial errors. Two issues were identified as appropriate for reconsideration: (1) pay phone resale; and (2) customer transfer charges. The Arbitrator's Supplemental Order addressing these issues was filed on January 16, 1997. The deadline for the parties to submit an agreement incorporating the determinations in the Decision and the Supplemental Order was reset for January 27, 1997.

* * * *

[PAGE 12]

4. The denial of physical collocation of remote switching units ("RSUs") would put a competing local exchange carrier ("CLEC") at a competitive disadvantage from both a cost and technical performance standpoint. Therefore, RSUs are equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier. Fully equipped switching equipment (host class 5 switches) are not

equipment necessary for interconnection and should not be required to be physically collocated on the premises of a local exchange carrier. A CLEC should not use physically collocated RSUs to avoid payment of access charges.

5. There are no express limitations regarding the provision of shared transport in the Agreement. Furthermore, the Agreement expressly provides that any request for interconnection or access to an unbundled network element not already available via a price list tariff shall be treated as a request subject to the BFR process. The Agreement states that "network element" means a facility or equipment used in the provision of a telecommunications service. End office to end office interconnection is described as a facility or equipment used in the provision of a telecommunications service; therefore, it is a network element which is not available as a stand-alone item via price list or tariff. The BFR process would be triggered by AT&T's request under the terms and conditions of the Agreement.

6. The Commission has already required that each company provide a directory to its customers, that each directory include the listings of all customers without regard to which company serves them, and that each directory include contact information on all companies providing local exchange service in that area. Insofar as AT&T can distribute a directory to its customers with its name solely on the cover without being unduly discriminatory, it is not appropriate to require USWC to place AT&T's name or logo on its directory cover; each company should determine what information appears on the cover of the directories which they distribute to their respective customers.

7. There are a number of implementation schedule points contained in AT&T's proposed attachment 7 to the Agreement which are not found elsewhere in the body of the Agreement. The schedule proposed by AT&T is reasonable with the exception of service intervals which were included in attachment

8. The several clarifications which have been recommended by Commission Staff are well founded and necessary in order to accurately reflect the decisions by the arbitrators, and to provide the parties with a complete Agreement.

9. The Agreement is otherwise consistent with Washington law and with the orders and policies of this Commission.

* * * *

APPENDIX I

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DOCKET NO. UT-960347

In the Matter of the Petition for Arbitration
of an Interconnection Agreement Between

SPRINT COMMUNICATIONS COMPANY L.P.
and U S WEST COMMUNICATIONS, INC.

Pursuant to 47 USC § Section 252.

COMMISSION ORDER APPROVING
INTERCONNECTION AGREEMENT WITH
MODIFICATION

MEMORANDUM

I. Procedural History

On April 15, 1996, Sprint Communications Company L.P. ("Sprint") requested negotiations with U S WEST Communications, Inc. ("USWC") for interconnection under the terms of the Telecommunications Act of 1996, Public Law No. 104-104, 101 Stat. 56, codified at 47 USC § 151 et seq. (the "1996 Act" or "the Act").

On September 20, 1996, Sprint timely filed with the Commission and served on USWC a request for arbitration pursuant to 47 USC § 252(b)(1). The matter was designated

Docket No. UT-960347. On October 10, 1996, the Commission entered an Order on Arbitration Procedure appointing Simon Fitch as arbitrator and establishing certain procedural requirements. USWC timely responded to Sprint's petition on October 15, 1996.

"Final offer" arbitration was adopted for this arbitration. A hearing was held before the arbitrator on December 12, 1996, in the Commission's main hearing room in Olympia, Washington. Sprint was represented by Richard L. Goldberg, attorney, and USWC was represented by Lisa Anderi, attorney. Following the hearing, the parties filed final briefs and "last best offers" on January 3, 1997.

On January 15, 1997, the Arbitrator's Report and Decision ("Decision") was issued resolving the disputed issues presented in the final briefs and offers. In preparing the arbitration report in this matter, the arbitrator selected between the parties' last proposals as to each unresolved issue, selecting the proposal which was most consistent with the requirements of state and federal law and Commission policy. The arbitrator either chose either an entire proposal, or chose between parties' proposals on an issue-by-issue basis. In the event that neither proposal was consistent with law or Commission policy, the arbitrator rendered a determination in keeping with those requirements. The parties were instructed to submit an Interconnection Agreement ("Agreement") in accordance with the Decision within thirty days. The parties continued to negotiate and upon requests of the parties, for good cause stated, the Commission extended the filing deadline of the Agreement to May 19, 1997.

On May 19, 1997, each party filed a separate Request for Approval and Modification of the Agreement along with a signed copy of the Agreement. On June 13, 1997, the Commission convened an open meeting at its offices in Olympia, Washington, to consider the requests for approval of the Agreement. The Commission reviewed the record of

the proceeding: the Arbitrator's Decisions; the Agreement; written comments by the parties; the written Commission Staff report; and all oral comments *made at the open meeting* by Richard L. Goldberg for Sprint, Lisa Anderi for USWC, Jeffrey Goltz of the Attorney General's Office, and by Jing Roth and Glenn Blackmon of Commission Staff. Commission Staff presented its recommendation that the Agreement be approved without any modification of the Arbitrator's Decision or revisions to proposed language by the parties.

At the conclusion of the open meeting, the Commission adopted the Arbitrator's Decision and approved the Agreement subject to the modification and language changes which are discussed below. The Commission directed that a written order be prepared in accordance with its decision.

II. Modification of the Arbitrator's Decision

Sprint requested that language in the Agreement which related to the Arbitrator's Decision on the issue of Centrex resale restrictions be modified in order to further clarify the Decision. Staff stated its position that the Arbitrator's Decision on this issue was clear and that no clarification was necessary. USWC opposed the modification as being inconsistent with the Arbitrator's Decision. Sprint modified its request for clarification and proposed that the following language be included in the Agreement in Section 31.2.5.1:

> Centrex type services may only be sold to customers qualified to purchase those services pursuant to the USWC tariff.

The Commission determined that to the extent that the USWC Centrex tariff may be subject to contrasting interpretations when considered in the abstract, the availability of Centrex services for resale should be determined by the actual qualification of customers by USWC.

Commission Staff also recommended that all other requests for modification of the Arbitrator's Decision by the parties be denied. Sprint requested that the Commission interpret the MFN provisions as set forth in 47 USC § 252(i) to encompass a "pick and choose" approach. Sprint also requested that the Commission modify the Arbitrator's Decision by replacing the requirement that additional service measurements should be negotiated in a bona fide request ("BFR") process. USWC requested that the Arbitrator's Decision be modified to forward the carrier common line charge to Sprint for remote call forwarding when a Sprint customer retains a previous local phone number. USWC also requested that the Arbitrator's Decision be modified to prevent a requesting carrier to combine unbundled network elements for the purpose of providing a telecommunications service.

III. Generic Pricing Proceeding

On October 23, 1996, the Commission entered an order in this and other arbitration dockets declaring that a generic proceeding, UT-960369, et al., would be initiated in order to review costing and pricing issues for interconnection, unbundled network elements, transport and termination and resale.[1] The Commission stated that rates adopted in the pending arbitrations would be interim rates, pending the completion of the generic proceeding. Accordingly, the price proposals made in this arbitration have been reviewed with the goal of determining which offers a more reasonable interim rate, more closely based on what we believe to be accurately determined cost levels based on evidence specifically submitted in this docket, our recent prior actions regarding cost studies, and our expertise as regulators. The findings and conclusions with respect to price proposals and

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[1] Order on Sprint's Petition to Intervene and to Establish Generic Pricing Proceeding (October 23, 1996; "Generic Pricing Order").

supporting information are made in this context and do not indicate Commission approval or rejection of cost and price proposals for purposes of the generic case.

IV. Application of Rates and Charges

The negotiated agreement between the parties regarding the application of rates and charges for interconnection, resold services, and unbundled network elements is that where no state-specified permanent or interim rates exist, they agree to use the ordered and approved American Telephone & Telegraph ("AT&T") rates as interim rates until such time as the Commission Issues an order in a generic proceeding, implementing approved rates, whether those approved rates are interim or final. The parties agree that the term "rates" includes rate structure, and that upon issuance of an order in the generic case. USWC will move Sprint to such approved rates and true up the amounts charged up to that point in time.

In Washington, the AT&T interim rates shall be established in Docket No. 960309 which is presently pending before the Commission. Sprint and USWC agree to file those rates(which are incorporated into the Agreement by reference) in this proceeding within ten days of the Commission's order approving the arbitrated interconnection agreement in Docket No. 960309.

V. The Eighth Circuit Order and the FCC Rules

The FCC's rules[2] implementing local competition provisions of the Telecom Act have been repealed and the rules relating to costing and pricing have been stayed by the

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[2] In the Matter of the Implementation of the Local Competition Rules of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order (August 8, 1996), Appendix B - Final Rules.

United States Court of Appeals for the Eighth Circuit.[3] The Arbitrator's Report and Decision and the Commission in this order comply with those provisions of the FCC order and rules that are not subject to stay. Those provisions which are subject to stay do not require compliance pending resolution of the federal appeal. However, the stay does not preclude reference by the Commission to the rationale or analysis underlying those provisions, for whatever value such information may have on its own merits.

Having considered the Arbitrator's Report and Decision, the Agreement, the requests for approval and modification filed by the parties to this arbitration, the entire record herein, and all written and oral comments made to the Commission, the Commission makes and enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The Washington Utilities and Transportation Commission is an agency of the state of Washington, vested by statute with authority to regulate in the public interest the rates, services, facilities, and practices of telecommunications companies in the state.

2. The Washington Utilities and Transportation Commission is designated by the Telecommunications Act of 1996 as the agency responsible for arbitrating and approving interconnection agreements between telecommunications carriers, pursuant to Sections 251 and 252 of the Act.

3. USWC was, until recently, the de facto monopoly provider of switched local exchange service in its

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[3] *Iowa Utilities Board et al. v. FCC*, No. 96-3321, Order Granting Stay Pending Judicial Review (8th Cir. Oct. 15, 1996). The order also stays the "MFN" rule in which the FCC interpreted the statutory provisions regarding availability of contracted terms to other parties.

Washington exchanges, is an incumbent local exchange carrier, and is currently the dominant provider of switched local services within the territory of its Washington exchanges.

4. Sprint provides switched intraLATA and interLATA exchange service in Washington and seeks to provide competitive local exchange service in the intrastate territory of USWC.

5. On September 20, 1996, Sprint filed a Petition for Arbitration of an interconnection agreement with USWC pursuant to the Act. USWC responded to Sprint's petition on October 15, 1996. A hearing on the disputed issues was conducted by arbitrator Simon FFitch on December 12, 1996.

6. This arbitration and approval process was conducted pursuant to and in compliance with the Commission's Interpretive and Policy Statement Regarding Negotiation, Mediation, Arbitration, and Approval of Agreements Under the Telecommunications Act of 1996, Docket No. UT-960269, June 27, 1996. The Arbitrator's adoption of "best offer" arbitration was reasonable and was consistent with the authority delegated to the arbitrator in the Commission's Order on Arbitration Procedure dated October 10, 1996.

7. On January 15, 1997, the arbitrator issued an Arbitrator's Report and Decision resolving the disputed issues between the parties to this proceeding. The parties were instructed to submit an interconnection agreement in accordance with the Decision within thirty days. Upon the request of the parties, for good cause, extensions of time were granted by the Commission to May 19, 1997.

8. On May 19, 1997, Sprint filed its Request for Approval and Modification of Negotiated/Arbitrated Agreement and an unsigned Agreement for the State of Washington. On that same date, USWC filed its Request For

Approval and Modification of Arbitrated Agreement and the same proposed Agreement. Both parties requested modification of the Arbitrator's Decision and stated their respective positions regarding disputed language in the Agreement.

9. On June 13, 1997, the Commission held an open meeting at its Main Hearing Room in Olympia, Washington to consider the requests for approval of the Agreement. Commission Staff presented its recommendations regarding modification and adoption of the Arbitrator's Decision, and approval of the Agreement. Counsel for Sprint made comments relating to modification of the Arbitrator's Decision on the issue of Centrex resale restrictions. USWC opposed the modification as being inconsistent with the Arbitrator's Decision. Sprint modified its request and proposed that the following language be included in Section 31.2.5.1 of the Agreement:

> Centrex type services may only be sold to customers qualified to purchase those services pursuant to the USWC tariff.

10. Sprint requested that the Commission interpret the MFN provisions as set forth in 47 USC § 252(i) to encompass a "pick and choose" approach. Sprint also requested that the Commission modify the Arbitrator's Decision by replacing the requirement that additional service measurements should be negotiated in a bona fide request ("BFR") process. USWC requested that the Arbitrator's Decision be modified to forward the carrier common line charge to Sprint for remote call forwarding when a Sprint customer retains a previous local phone number. USWC also requested that the Arbitrator's Decision be modified to prevent a requesting carrier to combine unbundled network elements for the purpose of providing a telecommunications service. Commission Staff recommended that all requests for

modification of the Arbitrator's Decision by the parties be denied.

11. The negotiated agreement between the parties regarding the application of rates and charges for interconnection, resold services, and unbundled network elements is that where no state-specified permanent or interim rates exist, they agree to use the ordered and approved American Telephone & Telegraph ("AT&T") rates as interim rates until such time as the Commission issues an order in a generic proceeding, implementing approved rates, whether those approved rates are interim or final. The parties agree that "rates" include rate structure, and that upon issuance of an order in the generic case, USWC will move Sprint to such approved rates and true up the amounts charged to that point. In Washington, the AT&T interim rates shall be established in Docket No. 960309 which is presently pending before the Commission. Sprint and USWC agree to file those rates (which are incorporated into the Agreement by reference) in this proceeding within ten days of the Commission's order approving the arbitrated interconnection agreement in Docket No. 960309.

12. The Commission has reviewed and analyzed the Commission Staff's recommendations, the Arbitrator's Report and Decision, the proposed Agreement, the filings of the parties and the record herein, including the oral comments made at the open meeting. The Commission hereby adopts and incorporates by reference the findings and conclusions of the Arbitrator's Report and Decision, subject to the modifications which are Ordered herein.

13. At an open meeting on April 1, 1997, the Commission approved Sprint's request that the following language be included in Section 31.2.5.1 of the Agreement:

Centrex type services may only be sold to customers qualified to purchase those services pursuant to the USWC tariff.

14. The Commission approved the proposal of the parties to use the ordered and approved American Telephone & Telegraph ("AT&T") rates as interim rates until such time as the Commission issues an order in a generic proceeding, and that USWC move Sprint to such approved rates and true up the amounts charged up to that point in time. In Washington, the AT&T interim rates shall be established in Docket No. 960309 which is presently pending before the Commission. The Commission also approved the agreement between Sprint and USWC to file those rates in this proceeding within ten days of the Commission's order approving the arbitrated interconnection agreement in Docket No. 960309, and the Commission approved the incorporation of those terms into the Agreement by reference.

15. Other than the inclusion of Sprint's proposed language in Section 31.2.5.1, the Commission denied the parties other requests for modification and adopted the Commission Staff recommendation that the Agreement be approved.

CONCLUSIONS OF LAW

1. The provisions of the Agreement meets the requirements of Section 251 of the Telecom Act, including the regulations prescribed by the Federal Communications Commission pursuant to Section 251 which have not been stayed, and the pricing standards set forth in Section 252(d) of the Act.

2. The negotiated provisions of the Agreement do not discriminate against a telecommunications carrier not a party to the agreement, and it is accepted as consistent with the public interest, convenience and necessity.

3. The contract language proposed by Sprint in Section 31.2.5.1 of the Agreement is consistent with the Arbitrator's decision and should be incorporated into the Agreement.

4. The proposal of the parties to use the ordered and approved American Telephone & Telegraph ("AT&T") rates as interim rates until such time as the Commission issues an order in a generic proceeding, and that USWC move Sprint to such approved rates and true up the amounts charged is reasonable and is consistent with the public interest, convenience, and necessity. In Washington, the AT&T interim rates shall be established in Docket No. 960309 which is presently pending before the Commission. It is also reasonable that Sprint and USWC file those rates in this proceeding within ten days of the Commission's order approving the arbitrated interconnection agreement in Docket No. 960309, and that those terms are incorporated into the Agreement by reference.

5. The parties failed to establish a proper foundation in support of their other requests for modification, and the Commission Staff recommendation that the other requests be denied is well founded.

6. The Agreement is otherwise consistent with Washington law and with the orders and policies of this Commission.

ORDER

THE COMMISSION ORDERS:

1. The Agreement filed by the parties on May 19, 1997, is approved subject to the inclusion of Sprint's proposed language in Section 31.2.5.1.

2. USWC shall file a revised Agreement or revised pages for insertion into the Agreement within ten days. The

revised agreement shall be integrated and conform with the Commission's modification of the Arbitrator's Decision.

3. In the event that the parties revise, modify or amend the agreement approved herein, the revised, modified, or amended agreement shall be deemed to be a new negotiated agreement under the Telecommunications Act and shall be submitted to the Commission for approval, pursuant to 47 U.S.C. § 262(e)(1) and relevant provisions of state law, prior to taking effect.

4. The Agreement approved in this Order shall be effective in thirty days.

DATED at Olympia, Washington, and effective this 18th day of June 1997.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SHARON L. NELSON, Chairman

RICHARD HEMSTAD, Commission

WILLIAM GILLIS, Commission

APPENDIX J

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DOCKET NO. UT-960310

In the Matter of the Petition for Arbitration of an Interconnection Agreement Between

MCImetro ACCESS SERVICES, INC. and U S WEST COMMUNICATIONS, INC.

Pursuant to 47 USC Section 252

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* * * *

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contribution to overhead and profit than some other services, but an appropriate wholesale discount should leave U S

WEST with the same contribution from a wholesale transaction as a retail transaction.

Issue 34 MCImetro Prevails.

6. Issue 39: Construction & Other Additional Charges

Issue. Should the Commission permit U S WEST to impose construction charges or any other costs of compliance with the mandatory resale provisions of the Act which U S WEST does not similarly bill its own retail customers?

MCImetro's Position. Costs that U S WEST incurs to construct facilities are presumably included in the prices it charges its customers and, therefore, will be included in the prices it charges its resale customers. U S WEST's contention that these costs represent a "loss" to it is nonsensical. When U S WEST constructs new facilities, it does not demand that end user customers pay "up front" for those facilities. The provisions of the Act and state law which prohibit discrimination require that resellers enjoy the same treatment.

U S WEST's Position. The Arbitrator should rule that the same construction tariff that applies to end users should apply to resellers.

Decision. The actual amount that U S WEST charges end users for new construction is in its tariffs. Those tariff provisions should govern new construction charges for MCImetro when its resells a U S WEST service.

Issue 39 U S WEST Prevails.

IX. STRUCTURAL FACILITIES

A. Inside Plant

1. Issue 9: Types of Equipment

Issue. What equipment is "necessary" for interconnection or access to unbundled network elements?

MCImetro's Position. New entrants should be able to collocate Remote Switching Units because they perform concentrating functions and do not take more space or power than transmission equipment. Collucating remote switching units is a more technically efficient option and is critical for accessing unbundled loops.

[PAGE 39]

U S WEST's Position. Remote Switching Units are switching equipment, as opposed to transmission or multiplexing equipment, and their primary purpose is not interconnection or access to unbundled elements. Their primary purpose is to switch calls.

The Act. The incumbent must provide space for any equipment "necessary" for interconnection or access to unbundled network elements.

FCC Rules. § 51.5 defines "equipment necessary for interconnection or access to unbundled network elements" simply as equipment "used" to interconnect or gain access.

§ 51.323(c) states: "Nothing in this section requires an incumbent LEC to permit collocation of switching equipment or equipment used to provide enhanced services."

FCC Order. In ¶ 579, the FCC concluded that the broader "used or useful" definition is more consistent with the competitive goals of the Act than the narrow "indispensable" interpretation.

In ¶ 581, the FCC noted that technology is blurring the distinction between switching equipment and multiplexing equipment. It left the issue of whether §251 (c)(6) covers specific switching equipment to the states:

Decision. Neither the Act nor FCC rules require an incumbent to allow a new entrant to collocate switching equipment inside the incumbent's central office. MCImetro has the option of using either subloop unbundling alternatives or direct (copper) cable from U S WEST's

central office to connect customers to a nearby MCImetro switching location. MCImetro and U S WEST should explore other alternatives, such as the use of digital cross connect systems (DCS), to eliminate the need for back to back subscriber loop carrier configurations.

Issue 9 U S WEST Prevails.

2. Issue 11: Direct Collocator-to-Collocator Connections

Issue. Under what conditions must U S WEST allow MCImetro to directly connect its facilities to other collocators?

MCImetro's Position. U S WEST should permit MCImetro to directly interconnect with another collocating carrier through MCImetro facilities.

* * * *

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Issue 61 MCImetro Prevails.

Issue 64 MCImetro Prevails

Issue 65 MCImetro Prevails

Issue 67 MCImetro Prevails

f) Issues 15 & 84: Loop Conditioning

Issue. Should the basic TELRIC loop price cover loop conditioning?

MCImetro's Position. The cost of conditioning should be included in the TELRIC price of the loop facility. In addition, specific contract provisions are necessary to ensure that MCImetro does not confront unreasonable and costly delays and service problems in the manner in which the loop is provided.

U S WEST's Position. A carrier asking U S WEST to condition loop must pay the cost of conditioning. U S WEST has not developed conditioning prices at this point in time.

FCC Order. In ¶ 380 the FCC includes "conditioned" loops in the definition of the local loop element. In ¶ 382 the FCC recognizes that its definition of the local loop element may require an incumbent to conditioned some loops for a higher level of service. It requires the requesting new entrant to pay the cost of conditioning.

Decision. While the FCC requires an incumbent to condition a loop when it is technically feasible to do so, the FCC also requires the new entrant to pay the cost of conditioning. Since conditioning is a nonrecurring cost with long term benefits, the Commission should decide, as a matter of policy, whether to recover the cost through a nonrecurring charge or a higher recurring rate for higher capacity lines. The Commission will have an opportunity to do so in the generic proceeding. In the mean time, there is no price proposal other than MCImetro's offer and the Arbitrator adopts it.

Issue 15 MCImetro Prevails.

Issue 84 MCImetro Prevails

4. Restrictions

a. Issue 25: Replication of Incumbent Services

Issue. May U S WEST prohibit MCImetro from assembling network elements to replicate existing U S WEST services?

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MCImetro's position. No. The Act does not limit the ability of a new entrant to combine unbundled elements.

U S WEST's Position. No. If the Commission adopts MCImetro's position, MCImetro will be able to order U S WEST to provide a finished retail service but get a cheaper

price than the Act's resale price (retail less cost avoided) by using the fiction that MCImetro is buying unbundled network elements --when in reality there is no unbundling involved and MCImetro is not self-provisioning any elements. In this manner, MCImetro can completely circumvent the resale provisions of the Act—engaging in "sham" unbundling. Sham unbundling could also enable interexchange carriers to avoid paying switched access charges through the purchase of unbundled network elements. Sham unbundling creates significant opportunities for price arbitrage between resale prices and the prices of unbundled elements. It would upset the balance between resale and unbundling which Congress created when it crafted separate and distinct resale and unbundling provisions.

The Act. The incumbent must provide elements in a manner that allows other carriers to combine the elements into telecommunications services. §251(c)(3).

FCC Rules. §51.307(c): interprets the Act as enabling new entrants to assemble network elements into *any* service. §51.309(a) interprets the Act as prohibiting incumbents from restricting use of network elements.

FCC Order. In ¶292, the FCC specifically concluded that the Act does not prevent new entrants from using network elements to replicate incumbent services. ¶322 shows that the FCC was aware of the arbitrage argument.

Decision. There are two problems with U S WEST's argument on this issue:

Relationship Between Elements and Services. Most elements are part of two or more services and most services use two or more elements. There is no direct relationship between, for example, the price for the local loop element and the wholesale price for basic local service. The local loop element additionally creates an opportunity to earn revenues from toll and other services, but requires the purchase of additional elements to provide any service. Many of the

additional elements create opportunities for additional services, but require the purchase of additional elements to provide those services. The indirect relationship between elements and services means that they are not direct substitutes. Since they are not direct substitutes, §251(c)(3) and §251(c)(4) cannot be mutually exclusive.

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Arbitrage. To the extent there is an arbitrage opportunity between elements and services, it is similar to the arbitrage opportunity between apples and oranges. "Sham unbundling" is not a problem.

Issue 25 MCImetro Prevails.

b. Issue 7: Distance Limitations for Mid-Span Meets

Issue. Should the Commission allow U S WEST to place a distance limit on mid-span meets.

MCImetro's Position. The Act does not permit U S WEST to place a distance limit on mid-span meets.

U S WEST's Position. The Commission should not require U S WEST to provide more then one mile of facilities to the meet point. In no case should it provide facilities for more than one half the distance of the route.

FCC Order. In ¶553 the FCC concluded that state commissions are in a better position to determine the appropriate distance an incumbent should build facilities to accommodate interconnection:

Decision. In light of MCImetro's ability to unilaterally select interconnection at any feasible point, and U S WEST's responsibility for the cost of facilities on its side of a meet point, it is reasonable to impose a distance limit on U S WEST's obligation to build facilities to a meet point. U S WEST's proposal of a one-mile limit is reasonable. It also is reasonable for each party to build one-half of the facilities for shorter distances.

Issue 7 U S WEST Prevails.

XI. ANCILLARY FUNCTIONS

A. Availability & Restrictions

1. Issues 70 & 71: Directories

Issue. To what extent should the Commission require U S WEST to provide directory listings, assist MCImetro with Yellow Pages advertising, and distribute directories?

* * * *

APPENDIX K

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DOCKET NO. UT-960309

In the Matter of the Petition for Arbitration of an Interconnection Agreement Between

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC. and U S WEST COMMUNICATIONS, INC.

Pursuant to 47 USC Section 252

ARBITRATOR'S REPORT AND DECISION

I. INTRODUCTION

A. Procedural History

On March 1, 1996, AT&T Communications of the Pacific Northwest, Inc. ("AT&T") requested negotiations with U S WEST Communications, Inc. ("USWC") for interconnection under the terms of the Telecommunications Act of 1996, Public Law No. 104-104, 101 Stat. 56, *codified at* 47 USC § 151 et seq. (1996) ("the Act" or "1996 Act").

On July 25, 1996, AT&T timely filed with the Washington Utilities and Transportation Commission

("Commission")[1] and served on USWC a request for arbitration pursuant to 47 USC § 252(b)(1). The matter was designated Docket No. UT 960309. On August 5, 1996, the Commission entered an Order on Arbitration Procedure appointing the undersigned as arbitrator and establishing certain procedural requirements. USWC timely filed its response to the petition.

"Final offer" (or "best and final offer") arbitration was adopted for this arbitration. In preparing the arbitration report in this matter, the arbitrator will select between the parties' last proposals as to each unresolved issue, selecting the proposal which is most consistent with the requirements of state and federal law and Commission policy. The arbitrator will choose either an entire proposal, or choose between parties' proposals on an issue-by-issue basis. In the event that neither proposal is consistent with law or Commission policy, the arbitrator will render a determination in keeping with those requirements.

A hearing was held before the arbitrator on October 21 and 22, 1996, in the

* * * *

[PAGE 5]

"joint forecasting" is required is at odds with the FCC's determination that new carriers should not be required to provide detailed estimates of projected market demand.

Issue No. 4: Two-Way Trunking

AT&T Position

Two-way trunking is technically feasible and should be permitted. AT&T Contract, AT&T.3, Appendix A, §§ 1.1.1 and 1.3.

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[1] In this decision, the WUTC is referred to as the Commission. The Federal Communications Commission is referred to as the FCC.

USWC Position

USWC prefers the use of two-way trunking where technically feasible. Different types of traffic (such as toll and local) should be separated onto different trunk groups. USWC argues that these types of traffic have traditionally been separated because of the different rate structure, a practice which should continue until the opportunity for arbitrage is addressed through a consistent rate structure for both types of traffic.

Arbitrator's Decision

The arbitrator adopts the USWC position.

Discussion

The parties differ primarily on the issue of traffic separation when two-way trunks are used, rather than on the use of two-way trunks per se.[7] The positions are somewhat unclear. On the one hand, it appears to be addressed in the Agreement for Withdrawal. On the other, USWC states that AT&T continues to assert a dispute. AT&T does not address the issue in its brief. The Agreement for Withdrawal appears to clearly provide that separate trunk groups will be established for toll and local traffic. The USWC position is consistent with this provision.

Issue No. 9(a): Types of Collocated Equipment - Switching

AT&T Position

AT&T may collocate the type of equipment it deems necessary, except for large switching equipment such as 5ESS switches. AT&T Contract, AT&T.4, § 2.1. AT&T initially requested the ability to place all such equipment in collocated space. In a spirit

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[7] The issue of traffic separation for trunks is addressed in the Commission's Interconnection Order. *WUTC v. USWC*, UT 941464 *et al.*, Fourth Supplemental Order, October 31, 1995, pp. 46-47 ("WUTC Interconnection Order").

[PAGE 6]

of compromise, AT&T now limits its request to (a) Remote Switching Units (RSUs) and (b) Digital Cross Connect System (DCS), along with the ability to remotely configure DCS. This equipment is useful in interconnection and should be permitted. AT&T Contract, AT&T.4, § 2.2.4. AT&T will agree to not use RSU/RSMs or ORMs for the purpose of bypassing access charges.

USWC Position

Switching equipment is not required to be collocated because it does not meet the "necessary" requirement. *FCC Interconnection Order,* ¶ 581. RSUs are switching equipment that should not be collocated. USWC agrees to allow collocation of DCS.

Arbitrator's Decision

The arbitrator adopts the USWC position.

Discussion

The FCC Interconnection Order , at ¶ 581, declines to "impose a general requirement that switching equipment must be collocated since it does not appear that it is used for the actual interconnection or access to unbundled network elements." Where, as here, the functionality of the particular equipment is in dispute, the FCC states that "the state commission will determine whether the equipment at issue is actually used for interconnection or access to unbundled elements." The record establishes that the RSU would primarily be used for switching functions rather than interconnection. Tr. 454-457 (Bohling).

Issue No. 9(c): Types of Collocated Equipment - Vendors

AT&T Position

AT&T must have the ability to select its own vendors for installation and engineering of both virtual and physical collocated equipment.

USWC Position

If AT&T wants to use an outside vendor for installation, it may do so, but the vendor must be on USWC's approved list.

Arbitrator's Decision

The arbitrator adopts the AT&T position.

* * * *

[PAGE 12]

a network element. While there is no dispute that dark fiber is not currently being "used" to provide service, this is an overly literal- reading of the statute. Clearly, the purpose of fiber is to be used to provide telecommunications service, as the Commission has recognized.[9] Allowing access to dark fiber is comparable to allowing access to capacity on poles, conduits, or rights-of-way. Issues of technical feasibility can be addressed as they arise. In the meantime, this component of the network should be available to competitors to allow them to provide service. (See discussion at Issue No. 55 - Modification of Facilities).

Issue No. 25: Combinations ("Sham" or "Finished Service" Unbundling)

USWC Position

AT&T should not be permitted to recombine unbundled elements, without using any AT&T facilities, where the recombination does nothing more than rebundle all of the USWC elements of an existing USWC finished service. AT&T may buy the finished service for resale under § 251 (C)(4) of the Act.

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[9] Although the *Electric Lightwave* decision does not directly address the issue presented here, the opinion refers to a determination by the Commission that dark fiber is a telecommunications service. 123 Wn2d at 545. *See also, In re Digital Direct of Seattle, Inc.*, Docket Nos. UT-910776, UT-910777, Fourth Supplemental Order (April 1992).

AT&T Position

AT&T should be permitted to purchase unbundled elements, either individually or in combination, whether or not AT&T provides its own facilities. AT&T Contract, AT&T.5, § 2.

Arbitrator's Decision

The arbitrator adopts the AT&T position.

Discussion

The 1996 Act states, in pertinent part, that it is:

> "The duty [of the incumbent LEC] to provide, to any requesting telecommunications carrier *for the provision of a telecommunications service* ... access to network elements on an unbundled basis[.] An incumbent local exchange carrier shall provide such unbundled network elements in a manner *that allows requesting carriers to combine such elements in order to provide such telecommunications service."* 47 USC § 251(c)(3). (Emphasis added).

[PAGE 13]

The Act, on its face, therefore, appears to expressly permit the combination of elements by a requesting carrier for the purpose of providing a telecommunications service. The FCC takes this view, finding no basis to conclude from the Act's language "a limitation or requirement in connection with the right of new entrants to obtain access to unbundled elements." *FCC Interconnection Order,* ¶ 328.[10] Consistent

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[10] *See generally, FCC Interconnection Order,* ¶¶ 329-341. The FCC rejects many of the arguments raised here by USWC, stating, for example:

> We disagree with the premise that no carrier would consider entering local markets under the terms of section 251(c)(4)

with this interpretation, the FCC rules permit the combination of unbundled elements by requesting carriers to provide a telecommunications service. 47 CFR § 51.315(a). This section of the FCC rules is not subject to the Eighth Circuit stay.

While USWC makes a number of practical and policy arguments against permitting combination of elements into a "finished service," USWC's primary statutory argument is that Congress' incorporation of distinct resale and unbundling provisions allows the inference that Congress intended the limitation that USWC seeks. It does not identify any language in Section 251(c)(3) which supports imposition of such a restriction on unbundling.

C. Resale (Issue Nos. 27-41)

Issue Nos. 27-28: Services Subject to Resale

USWC Position

USWC will make the following services available for resale (per the matrix): Residence basic exchange, Centrex Plus, Operator Services, Directory Assistance, Optional Calling Plans, Volume Discount Plans, Discounted Feature Packages, Private Line Transport, Negotiated contract arrangements, Business Basic Exchange, PBX Trunks, Frame Relay Service, ISDN, Listings, Features, IntraLATA toll, and WATS. *See also*, Appendix A, p. 5.

While Lifeline, Link-Up, and relay services are listed on the matrix as services that will be not be made available, hearing testimony partially resolved this question. (See discussion section). * * * *

> [resale] if it could use recombined network elements solely to offer the same or similar services that incumbents offer for resale. We believe that sections 251(c)(3) and 251(c)(4) present different opportunities, risks, and costs in connection with entry into local telephone markets[.]

Id., ¶ 331.

APPENDIX L

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DOCKET NO. UT-960347

In the Matter of the Petition for Arbitration of an Interconnection Agreement Between

SPRINT COMMUNICATIONS COMPANY L.P. and U S WEST COMMUNICATIONS, INC.

Pursuant to 47 USC § Section 252.

ARBITRATOR'S REPORT AND DECISION

I. INTRODUCTION

(a) Procedural History

On April 15, 1996, Sprint Communications Company L.P. ("Sprint") requested negotiations with U S WEST Communications, Inc. ("USWC") for interconnection under the terms of the Telecommunications Act of 1996, Public Law No. 104-104, 101 Stat. 56, codified at 47 USC § 151 et seq. (the "1996 Act" or "the Act")

On September 20, 1996, Sprint timely filed with the Commission and served on USWC a request for arbitration pursuant to 47 USC § 252(b)(1). The matter was designated Docket No. UT-960347. On October 10, 1996, the Commission entered an Order on Arbitration Procedure appointing the undersigned as arbitrator and establishing

certain procedural requirements. USWC timely filed its response to the petition.

"Final offer" arbitration was adopted for this arbitration pursuant to the Arbitrator's Second Procedural Order. In preparing the arbitration report in this matter, the arbitrator will select between the parties' last proposals as to each unresolved issue, selecting the proposal which is most consistent with the requirements of state and federal law and Commission policy. The arbitrator will choose either an entire proposal, or choose between parties' proposals on an issue-by-issue basis. In the event that neither proposal is consistent with law or Commission policy, the arbitrator will render a determination in keeping with those requirements.

A hearing was held before the arbitrator on December 12, 1996, in the Commission's main hearing room in Olympia, Washington. Sprint was represented by Richard L. Goldberg, attorney. USWC was represented by Lisa Anderi, attorney. Following the hearing, the parties filed final briefs and "last best offers" on January 3, 1996.

(b) Eighth Circuit Order and the FCC Rules

As the parties are aware, the FCC rules[1] implementing the local competition provisions of the Act have been appealed and those rules relating to costing and pricing have been stayed by the United States Court of Appeals for the Eighth Circuit.[2] The provisions of the FCC order and rules not subject to stay are adhered to in this report.

II. RESOLUTION OF DISPUTED ISSUES

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[1] In the Matter of the Implementation of the Local Competition Rules of the Telecommunications Act of 1996, CC Docket No, 96-98, First Report and Order (August 8, 1996), Appendix B - Final Rules.

[2] *Iowa Utilities Board et al. v. FCC*, No. 96-3321, Order Granting Stay Pending Judicial Review (8th Cir. Oct. 15, 1996). The order also stays the "MFN" rule. *See also*, Order Lifting Stay in Part (November 1, 1996) (stay lifted for 47 CFR §§ 51.701, 51.703, and 51.717).

Issue No. 1: "Most Favored Nations" (MFN) Provision

Sprint Position

Sprint takes the position that the language of 47 U.S.C. § 252(i) is clear in requiring that any component of an interconnection agreement be made available to other carriers. Sprint argues that, notwithstanding the Eighth Circuit stay, the Commission is free to adopt an interpretation of the statute consistent with Sprint's position.

USWC Position

USWC disagrees with Sprint's reading of the Act. USWC takes the position that Sprint's (and the FCC's) "pick and choose" interpretation is plainly inconsistent with the Act and undermines the entire negotiation process. It urges the Commission to adhere to the Eighth Circuit stay on this issue. Among other things, USWC points out that the FCC has expanded MFN beyond terms and conditions to include rates, although section 252(i) does not expressly reference rates.

Contract Provision(s)

Section 33.2

Arbitrator's Decision

The arbitrator adopts the USWC position.

Discussion

The "pick and choose" interpretation advocated by Sprint, as noted, has been adopted in the FCC rules 47 CFR § 51.809(a) and stayed by the Eighth Circuit. The arbitrator will adhere to the Eighth Circuit order. While the rule is

stayed, section 252(i) itself applies to the agreement, however, USWC's proposed contract language acknowledges the application of the provision and of any state and federal interpretations in effect from time to time. The language is reasonable.

Issue No. 2: Interim Number Portability (INP); Sharing of Access Revenues

Sprint Position

Sprint advocates that terminating access revenues should be assessed pursuant to meet-point billing arrangements consistent with the FCC Number Portability Order.[3] Sprint urges that, to the extent USWC's entrance facilitates, serving wire center, and access tandem switching are involved in transporting the call to the meet point, USWC should receive access charges and share transport charges with Sprint. To the extent Sprint is providing transport from the meet point, local switching and a line to the end user, Sprint should receive the local switching, residual interconnection charge (RIC), and carrier common line charge, and share transport charges with USWC.

USWC Position

USWC has filed an action in the United States Court of Federal Claims to challenge the Number Portability Order. USWC argues that the FCC Number Portability Order and the Sprint position result in an unconstitutional taking of USWC's property because it requires USWC to provide services and incur costs for which it will not be compensated.

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[3] *In the Matter of Telephone Number Portability*, First Report and Order, CC Docket No. 95-116, FCC 98-286 (released July 2, 1996) (FCC Number Portability Order) ¶ 140.

USWC also argues that its charges for Remote Call Forwarding only recover routing and look-up charges and not switching and transport. For interexchange calling, USWC assesses four charges to the IXC: local transport, local switching, interconnection, and carrier common line charges. While acknowledging that the FCC has mandated a different result, USWC argues that it should be allowed to retain the local switching and local transport charges from IXCs with regard to ported calls. As a compromise, USWC proposes to forward carrier common line charges to Sprint.

Contract Provision(s)

Section 8.1.8

Arbitrator's Decision

The arbitrator adopts the Sprint position.

Discussion

The FCC Number Portability order addresses the appropriate treatment of terminating access charges in the interim number portability context. While the FCC generally approves the model of meet-point billing arrangements between neighboring incumbent LECs, it requires incumbent LECs and competitors to share in the access revenues received for a ported call.

The FCC order states:

> "[W]e direct forwarding carriers and terminating carriers to assess on IXCs charges for terminating access through meet-point billing arrangements . . . . It is up to the carriers whether they each issue a bill for access to one ported call, or whether one of them issues a bill to the IXCs covering all of

> the transferred calls and shares the correct portion of the revenues with the other carriers involved."

Id.

Sprint's contract language is reasonable, based upon the functions and facilities provided by the carrier for call forwarding or termination. This result takes into account the fact that USWC receives compensation for INP costs by means of the Remote Call Forwarding charges agreed to by the parties in this negotiation.

Issue No. 3: Resale Restrictions

In the Arbitrator's Third Procedural Order the parties were directed to clarify whether their resale dispute includes the cross-class selling issue, or extends to the type of services which must be resold. USWC reports in its final brief that the parties have agreed on which services are available for resale and that the voice mail issue is not present in this proceeding.

USWC Position

USWC proposes that its services should be resold only for their "intended or disclosed use" and only to the same class of customers eligible to purchase the service from USWC.

USWC expresses a particular concern with the resale of Centrex service to other than business customers. USWC argues that Centrex was designed for a campus environment in the business market, not for resale to the residential market. USWC sees a potential adverse impact on at least three revenue streams: switched access charges, toll revenue, and features. USWC also argues that Centrex resale in the residential market would be inconsistent with Washington's average pricing philosophy. Finally, USWC notes that the

Commission approved a restriction on resale of Centrex in a recent order.

Sprint Position

Sprint would agree to contract provisions which explicitly reject the resale of residential services to business customers and of lifeline services to eligible users. It objects to USWC's position as unreasonable.

Contract Provision(s)

Section 29.2.5

Arbitrator's Decision

The arbitrator adopts the USWC position, subject to the discussion below.

Discussion

Section 251(c)(4)(B) prohibits unreasonable limitations or conditions on resale. As noted above, the FCC has concluded generally that "resale restrictions are presumptively unreasonable." *FCC Interconnection Order*, ¶ 939. Incumbent LECs can rebut the presumption by showing that the restriction is narrowly tailored. *Id.* The FCC identified only two restrictions it found reasonable: (1) restrictions on resale of short-term promotions; and (2) restrictions on cross-class selling of residential and Lifeline service. *Id.*, ¶ 950, 962. *See also*, 47 CFR § 51.613 (not subject to stay).

The difficulty with USWC's general position is that it appears to permit imposition of restrictions beyond those identified by the FCC.[4] As a practical matter, however,

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[4] Although USWC's proposed contract language can arguably read to be consistent with the Act, the position argued by USWC at hearing and

USWC's concern with resale of business services to the residential class of subscribers is limited to Centrex. Tr. 63-64 (Moran). USWC indicated that it could accept a restriction tailored to Centrex only. Tr. 64 (Moran).

USWC argues that the Eighteenth Supplemental Order in Docket UT-950200 authorized imposition of a requirement that Centrex be sold within class.[5] The Eighteenth Supplemental Order was restating, however, not changing the Fifteenth Supplemental Order in the docket, which had allowed USWC to include a general tariff provision restricting resale out of class. Fifteenth Supplemental Order, Docket No. UT-950200, p. 123. This resale restriction is not specific to Centrex.

Sprint should not be allowed to resell in a way which is prohibited by the USWC tariff. However, based on the hearing testimony, it appears that Centrex resale would not necessarily be subject to the "out of class" restriction in any event. USWC acknowledged that Centrex is not classified by tariff as a business service. Tr. 59-60 (Moran). USWC also conceded that if an apartment owner requested Centrex to serve multiple units in an apartment. USWC's tariff would require them to provide the service. Tr. 61-62 (Moran). Further, USWC stated that if the Commission approves withdrawal of Centrex service with grandfathering of existing customers, USWC would not object to Sprint taking over the Centrex service on a resale basis. Tr. 63 (Moran). Application of the general restriction to the Centrex situation should be interpreted in this light.

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in the briefs makes clear that USWC would interpret the language as permitting broader restrictions than those allowed under the FCC order.

[5] *Washington Utilities and Transportation Commission v. U.S. WEST Communications, Inc.*, Docket No. 950200, Eighteenth Supplemental Order, December 26, 1996, p. 8. *Amended and clarified*, Nineteenth Supplemental Order, December 30, 1996 (modifications not relevant here).

Issue No. 4: "Finished Service" Unbundling

USWC Position

USWC opposes what it terms "sham unbundling," by which means Sprint could purchase unbundled network elements in a manner and form that would enable it to recombine the elements into a "finished service" for resale without providing any of its own facilities. USWC argues that this approach is contrary to the intent of the 1996 Act and would destroy the competitive balance. USWC also expresses a concern that new entrants could purchase the elements necessary to provide access and thereby avoid the payment of access charges to USWC.[6]

USWC acknowledges that the FCC has interpreted the Act to preclude such limitations. In support of its position, USWC cites an amicus brief filed by four Congressmen in the Eighth Circuit appeal. Post-hearing Brief of USWC, p. 17.

Sprint Position

Sprint opposes the adoption of any restrictions on the combination of unbundled elements to provide new service as contrary to the 1996 Act.

Contract Provision(s)

30.1.2

Arbitrator's Decision

The arbitrator adopts the position of Sprint.

Discussion

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[6] The FCC may have addressed this problem in a subsequent Order on Reconsideration in the local competition rules docket. CC Docket No. 96-88, Order On Reconsideration, FCC 96-394 (September 27, 1996).

The 1996 Act states, in pertinent part, that it is:

> "The duty [of the incumbent LEC] to provide, to any requesting telecommunications carrier *for the provision of a telecommunications service*... access to network elements on an unbundled basis[.] An incumbent local exchange carrier shall provide such unbundled network elements in a manner *that allows requesting carriers to combine such elements in order to provide such telecommunications service*." 47 U.S.C. § 251(c)(3) (emphasis added).

The Act, on its face, therefore, appears to expressly permit the combination of elements by a requesting carrier for the purpose of providing a telecommunications service. As Sprint notes, the FCC takes this view, finding no basis to conclude from the Act's language "a limitation or requirement in connection with the right of new entrants to obtain access to unbundled elements." *FCC Interconnection Order*, ¶328.[7] Consistent with this interpretation, the FCC rules permit the combination of unbundled elements by requesting carriers to provide a telecommunications service. 47 CFR § 51.315(a). This section of the FCC rules is not subject to the Eighth Circuit stay.

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[7] *See generally, FCC Interconnection Order*, ¶¶ 329-341. The FCC rejects many of the arguments raised here by USWC, stating, for example:

> We disagree with the premise that no carrier would consider entering local markets under the terms of section 251(c)(4) [resale] if it could use recombined network elements solely to offer the same or similar services that incumbents offer for resale. We believe that sections 251(c)(3) and 251(c)(4) present different opportunities, risks, and costs in connection with entry into local telephone markets[.]

Id., ¶ 331.

Issue No. 5: Performance Measures and Standards

Sprint Position

Sprint argues that the Act requires USWC to provide parity of service, that is, service at least equal in quality to that which it provides itself. Sprint considers specific, enforceable quality standards an essential component of any contract between an incumbent and new entrant. Standards provide a means to measure whether parity of service is being provided and a means to deter anticompetitive conduct by the incumbent.

Sprint believes the Commission should require USWC to provide Sprint with detailed specifications showing all of its existing service quality and performance standards.

Sprint points out that both parties' witnesses at the hearing recognized the need to continue working to develop performance quality measurements and the utility of having the Commission encourage this process. Sprint expressed its willingness to negotiate with USWC regarding compensation where additional measurements are necessary and additional costs are incurred.

During negotiations, Sprint proposed twenty-one specific performance measures. To date, USWC has agreed to twelve of these.

USWC Position

USWC acknowledges that it must provide Sprint with service equal in quality to that which it provides itself.

It is willing to adopt the twelve agreed quality measures. With respect to the nine disputed measures, USWC argues that Sprint should use the bona-fide request process and pay for the additional cost. To the extent other competitive local exchange carriers want the measure, the additional costs would be shared.

USWC opposes the adoption of the AT&T/Pacific standards submitted in Sprint's final offer as Attachment 17, particularly because they contain liquidated damages provisions.

Contract Provision(s)

Section 31

Arbitrator's Decision

The arbitrator adopts the USWC position, subject to the discussion below.

Discussion

The 1996 Act requires incumbent LECs to provide interconnection "that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection." 47 USC § 251(c)(2)(B). This non-discrimination requirement is echoed in the unbundling and resale provisions of the Act. 47 USC § 251(c)(3) and (4).

The FCC interconnection Order concludes that the "equal in quality" standard of section 251(c)(2) requires an incumbent LEC to provide service to a CLEC that is indistinguishable from that it provides itself. The FCC further concludes that this obligation is not limited to the level of quality perceived by end-users, pointing out that such a standard could provide opportunities for discriminatory practices harmful to competitors, though not perceived by end-users, such as in pricing and ordering. *FCC Interconnection Order*, ¶ 224, 314. The FCC also declared the standard to be a minimum and "to the extent a carrier requests interconnection of superior or lesser quality than an incumbent LEC currently provides, the incumbent LEC is obligated to provide the requested interconnection arrangement if technical feasible[.] as long as new entrants

compensate incumbent LECs for the economic cost of the higher quality interconnection." *Id.* ¶ 225, 314.

The FCC rules adopted pursuant to the order require the "equal in quality" standard. 47 CFR § 51.311(a). In addition, however, the rules provide that, to the extent technically feasible, the quality of elements and access "shall, upon request, be superior in quality to that which the incumbent LEC provides to itself." 47 CFR § 51.311(c). If the incumbent fails to meet the requirement, it must prove to t he state commission that it is not technically feasible to do so. *Id.*

The precise positions of the parties on this issue were somewhat unclear. This was the case, at least in part, because the proposed contract language did not appear, on either side, to incorporate all the positions set out in the briefs. It is unclear, for example, whether the agreed measures (12 of 21) are reflected in the drafts.

While many of Sprint's points are valid, I am unwilling to require USWC to adopt the standards in Attachment 17 as "parity" standards, nor am I prepared to incorporate the liquidated damage provisions it contains.[8]

The parties are agreed that USWC should provide parity and have agreed to twelve specific performance measures. These terms should be incorporated in the agreement language. The agreement should include a requirement that USWC must provide complete information to Sprint as to its existing standards so that the parties can more readily determine that parity is being offered. As to the remaining nine standards sought by Sprint, or the additional items in Attachment 17, I will accept the USWC testimony that these go beyond parity. These items should be negotiated in a bona-fide request process. The general issue of prices for

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[8] At the hearing, Sprint stated it was not seeking an agreement providing for liquidated damages. Tr. 104-105.

superior levels of service can also be addressed in the generic proceeding.

III. IMPLEMENTATION SCHEDULE

Pursuant to 47 USC § 252(c)(3), the arbitrator is to "provide a schedule for implementation of the terms and conditions by the parties to the agreement." In this case the parties did not submit specific alternative implementation schedules. Specific contract provisions, however, contain implementation timelines. The parties shall implement the agreement pursuant to the schedule provided for in the contract provisions, and in accordance with the 1996 Act, the applicable FCC rules, and the orders of this Commission.

In preparing a contract for submission to the Commission for approval, the parties may include an implementation schedule.

IV. CONCLUSION

The foregoing resolution of the disputed issues in this matter meets the requirements of 47 USC § 252(c).

The parties are directed to submit an agreement consistent with the terms of this report to the Commission for approval within 30 days, pursuant to the following requirements of the Interpretive and Policy Statement.[9]

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[9] *In the Matter of Implementation of Certain Provisions of the Telecommunications Act of 1996*, Docket No. UT-960259, Interpretive and Policy Statement Regarding Negotiation, Mediation, Arbitration and Approval of Agreements Under the Telecommunications Act of 1996 (June 27, 1996) ("Interpretive and Policy Statement").

Filing and Service of Agreements for Approval

(i) An interconnection agreement shall be submitted to the Commission for approval under Section 252(e) within 30 days after the issuance of the Arbitrator's Report, in the case of arbitrated agreements, or, in the case of negotiated agreements, within 30 days after the execution of the agreement. The 30 day deadline may be extended by the Commission for good cause. The Commission does not interpret the nine month time line for arbitration under Section 252(b)(4)(C) as including the approval process.

(ii) Requests for approval shall be filed with the Secretary of the Commission in the manner provided for in the WAC 480-09-120. In addition, the request for approval shall be served on all parties who have requested service (List available from the Commission Records Center. See Section II.A.2 of the Interpretive and Policy Statement) by delivery on the day of filing. The service rules of the Commission set forth in WAC-480-09-120 and 420 apply except as modified in this interpretive order or by the Commission or arbitrator. Unless filed jointly by all parties, the request for approval and any accompanying materials should be served on the other signatories by delivery on the day of filing.

(iii) A request for approval shall include the documentation set out in this paragraph. The materials can be filed jointly or separately by the parties to the agreement, but should all be filed by the 30 day deadline set out in paragraph 1 above.

Negotiated Agreements

(i) A "request for approval" in the form of a brief or memorandum summarizing the main provisions of the agreement, setting forth the party's position as to whether the agreement should be adopted or modified, including a statement as to why the agreement does not discriminate against non-party carriers, is consistent with the public

interest, convenience, and necessity, and is consistent with applicable state law requirements, including Commission interconnection orders.

(ii) A complete copy of the signed agreement, including any attachments or appendices.

(iii) A proposed form of order containing findings and conclusions.

Arbitrated Agreements

(i) A "request for approval" in the form of a brief or memorandum summarizing the main provisions of the agreement, setting forth the party's position as to whether the agreement should be adopted or modified; and containing a separate explanation of the manner in which the agreement meets each of the applicable specific requirements of Sections 251 and 252, including the FCC regulations thereunder, and applicable state requirements, including Commission interconnection orders. The "request for approval" brief may reference or incorporate previously filed briefs or memoranda. Copies should be attached to the extent necessary for the convenience of the Commission.

(ii) A complete copy of the signed agreement, including any attachments or appendices.

(iii) Complete and specific information to enable the Commission to make the determinations required by Section 252(d) regarding pricing standards, including but not limited to supporting information for (1) the cost basis for rates for interconnection and network elements and the profit component of the proposed rate, (2) transport and termination charges; and (3) wholesale prices.

(iv) A proposed form of order containing findings and conclusions.

Combination Agreements (Arbitrated/Negotiated)

(i) Any agreement containing both arbitrated and negotiated provisions shall include the foregoing materials as appropriate, depending on whether a provision is negotiated or arbitrated. The memorandum should clearly identify which sections were negotiated and which arbitrated.

(ii) A proposed form of order is required, as above.

(iii) Any filing not containing the required materials will be rejected and must be refiled when complete. The statutory time lines will be deemed not to begin until a request has been properly filed.

Confidentiality

(i) Requests for approval and accompanying documentation are subject to the Washington public disclosure law, including the availability of protective orders. The Commission interprets 47 USC § 252(h) to require that the entire agreement approved by the Commission must be made available for public inspection and copying. For this reason, the Commission will ordinarily expect that proposed agreements submitted with a request for approval will not be entitled to confidential treatment.

(ii) If a party or parties wishes protection for appendices or other materials accompanying a request for approval, the party shall obtain a resolution of the confidentiality issues, including a request for a protective order and the necessary signatures (Exhibits A or B to standard protective order) prior to filing the request for approval itself with the Commission.

Approval Procedure

(i) The request will be assigned to the Commission Staff for review and presentation of a recommendation at the Commission public meeting. The Commission does not interpret the approval process as an adjudicative proceeding under the Washington Administrative Procedure Act. Staff

who participated in the mediation process for the agreement will not be assigned to review the agreement.

(ii) Any person wishing to comment on the request for approval may do so by filing written comments with the Commission no later than 10 days after date of request for approval. Comments shall be served on all parties to the agreement under review. Parties to the agreement file written responses to comments within 7 days of service.

(iii) The request for approval will be considered at a public meeting of the Commission. Any person may appear at the public meeting to comment on the request for approval. The Commission may in its discretion set the matter for consideration at a special public meeting.

(iv) The Commission will enter an order, containing findings and conclusions, approving or rejecting the interconnection agreement within 30 days of request for approval in the case of arbitrated agreements, or within 90 days in the case of negotiated agreements. Agreements containing both arbitrated and negotiated provisions will be treated as arbitrated agreements subject to the 30 day approval deadline specified in the Act.

Fees and Costs

Each party shall be responsible for bearing its own fees and costs. Each party shall pay any fees imposed by Commission rule or statute.

DATED at Olympia, Washington and effective this 15th day of January 1997.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SIMON J. FITCH
Arbitrator

APPENDIX M

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No.98-35819
DC# CV-97-01508-BJR

MCI TELECOMMUNICATIONS CORPORATION, a Delaware corporation; MCI METRO ACCESS TRANSMISSION SERVICES, INC.,

Plaintiffs-Appellants,

v.

U.S. WEST COMMUNICATIONS, a Colorado corporation; THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION (WUTC); ANNE LEVINSON, Chair; RICHARD HEMSTAD; WILLIAM P. GILLIS, in their official capacities as Commissioners of WUTC,

Defendants-Appellees

AMERITECH CORPORATION, amicus; FEDERAL COMMUNICATIONS COMMISSION, amicus,

Amici Curiae

No. 98-35820
DC# CV-97-01508-BJR

MCI TELECOMMUNICATIONS CORPORATION, a Delaware corporation; MCI METRO ACCESS TRANSMISSION SERVICES, INC.

Plaintiffs,

v.

U.S. WEST COMMUNICATIONS, a Colorado corporation;

Defendant-Appellant,

THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION (WUTC); ANNE LEVINSON, Chair; RICHARD HEMSTAD; WILLIAM P. GILLIS, in their official capacities as Commissioners of WUTC,

Defendants-Appellees.

No. 98-35822
DC# CV-97-01508-BJR

MCI TELECOMMUNICATIONS CORPORATION, a Delaware corporation; MCI METRO ACCESS TRANSMISSION SERVICES, INC.

Plaintiffs,

v.

U.S. WEST COMMUNICATIONS, a Colorado corporation; ANNE LEVINSON, Chair; RICHARD HEMSTAD; WILLIAM P. GILLIS, in their official capacities as Commissioners of WUTC,

Defendant-Appellant,

and

THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION (WUTC),

Defendant-Appellant.

ORDER

Before: GOODWIN, SCHROEDER, AND GRABER, Circuit Judges

The panel has voted to deny appellee/cross-appellant's petition for rehearing and to reject the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the petition for rehearing en banc is rejected.

The panel has voted to deny appelle/cross-appellant's petition for rehearing and to reject the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the petition for rehearing en banc is rejected.

APPENDIX N

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-35789
D.C. No. CV-97-01320-BJR
(Western Washington)

U S WEST COMMUNICATIONS, INC.,
Plaintiff-Appellee,

v.

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC.,
Defendant-Appellant.

No. 98-35828
D.C. No. CV-97-01320-BJR

U S WEST COMMUNICATIONS, INC.,
Plaintiff-Appellee/Cross-Appellant,

v.

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC.,
Defendant-Appellant/Cross-Appellee,

and

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION; ANNE LEVINSON, Chairperson; RICHARD HEMSTAD, Commissioner; WILLIAM P. GILLIS, Commissioner,
Defendants-Appellees.

No. 98-35829
D.C. No. CV-97-01320-BJR

U S WEST COMMUNICATIONS, INC.,
Plaintiff-Appellant/Cross-Appellee,

v.

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC.,
Defendant,

and

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION; ANNE LEVINSON, Chairperson; RICHARD HEMSTAD, Commissioner;WILLIAM P. GILLIS, Commissioner,
Defendants-Appellees/Cross-Appellants.

ORDER

Before: GOODWIN, SCHROEDER, and GRABER, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are

DENIED.

APPENDIX O

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-35821
D.C. No. CV-97-01764-BJR

U S WEST COMMUNICATIONS, INC., a Colorado corporation,

Plaintiffs-Appellee,

v.

SPRINT COMMUNCATIONS COMPANY L.P. ("SPRINT"), a limited partnership,

Defendant-Appellant,

and

ANNE LEVINSON, Chairwoman; RICHARD HEMSTAD, Commissioner; WILLIAM P. GILLIS, Commissioner, in their official capacities as Commissioners of the Washington Utilities & Transportation Commission; WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,

Defendants.

No. 98-35823
D.C. No. CV-97-01764-BJR

U S WEST COMMUNICATIONS, INC., a Colorado corporation,

Plaintiff-Appellee,

v.

SPRINT COMMUNICATIONS COMPANY L.P. ("SPRINT"), a limited partnership, ANNE LEVINSON, Chairwoman; RICHARD HEMSTAD, Commissioner; WILLIAM P. GILLIS, Commissioner, in their official capacities as Commissioners of the Washington Utilities & Transportation Commission;

Defendants,

and

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,

Defendant-Appellant.

ORDER

BEFORE: GOODWIN, SCHROEDER, and GRABER, Circuit Judges

The panel has voted to deny appellee/cross-appellant's petition for rehearing and to reject the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the petition for rehearing en banc is rejected.

APPENDIX P

STATUTORY PROVISIONS

47 U.S.C. § 251. INTERCONNECTION.

(a) GENERAL DUTY OF TELECOMMUNICATIONS CARRIERS. -- Each telecommunications carrier has the duty-

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256.

(b) OBLIGATIONS OF ALL LOCAL EXCHANGE CARRIERS. -- Each local exchange carrier has the following duties:

(1) RESALE. - The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) NUMBER PORTABILITY. - The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) DIALING PARITY. - The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the

duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) ACCESS TO RIGHTS-OF-WAY. - The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224.

(5) RECIPROCAL COMPENSATION. - The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) ADDITIONAL OBLIGATION OF INCUMBENT LOCAL EXCHANGE CARRIERS. - In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:

(1) DUTY TO NEGOTIATE. - The duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) INTERCONNECTION. - The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network-

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

(3) UNBUNDLED ACCESS. - The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) RESALE. - The duty-

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, Prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such to a different category of subscribers.

(5) NOTICE OF CHANGES.-The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) COLLOCATION. - The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) IMPLEMENTATION. -

(1) IN GENERAL. - Within 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete all actions necessary

to establish regulations to implement the requirements of this section.

(2) ACCESS STANDARDS. - In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether-

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) PRESERVATION OF STATE ACCESS REGULATIONS. - In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that-

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) NUMBERING ADMINISTRATION. -

(1) COMMISSION AUTHORITY AND JURISDICTION. - The Commission shall

create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) COSTS. - The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(f) EXEMPTIONS, SUSPENSIONS, AND MODIFICATIONS. -

(1) EXEMPTION FOR CERTAIN RURAL TELEPHONE COMPANIES-

(A) EXEMPTION.-Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) STATE TERMINATION OF EXEMPTION AND IMPLEMENTATION SCHEDULE.-The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State Commission receives notice of the request, the State Commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) LIMITATION ON EXEMPTION. .- The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) from a cable operator providing video programming, and seeking to provide any telecommunication service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on the date of enactment of the Telecommunications Act of 1996.

(2) SUSPENSIONS AND MODIFICATIONS FOR RURAL

CARRIERS. - A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State for a suspension or modification of the application of a requirement or requirement of subsection (b) or (c) to telephone exchange service facilities specified in such petition. The State Commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification-

(A) is necessary

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;
(ii) to avoid imposing a requirement that is unduly economically burdensome; or
(iii) to avoid imposing a requirement that is technically infeasible; and
(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirements or requirements to which the petition applies with respect to the petition carrier or carriers.

(g) CONTINUED ENFORCEMENT OF EXCHANGE ACCESS AND INTERCONNECTION REQUIREMENTS. - On and after the date of enactment of the

Telecommunications Act of 1996, each local exchange carrier, to the extent that it provides wireline services shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carriers on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment. During the period beginning on such date of enactment and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) DEFINITION OF INCUMBENT LOCAL EXCHANGE CARRIER. -

(1) DEFINITION. - For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that-

(A) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area; and

(B) (i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i).

(2) TREATMENT OF COMPARABLE CARRIERS AS INCUMBENTS. - The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if-

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) SAVINGS PROVISION. - Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201.

47 U.S.C. § 252. PROCEDURES FOR NEGOTIATION, ARBITRATION, AND APPROVAL OF AGREEMENTS.

(a) AGREEMENTS ARRIVED AT THROUGH NEGOTIATIONS. -

(1) VOLUNTARY NEGOTIATIONS. - Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) MEDIATION. - Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) AGREEMENTS ARRIVED AT THROUGH COMPULSORY ARBITRATION.-

(1) ARBITRATION. - During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) DUTY OF PETITIONER .-

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State

commission all relevant documentation concerning-

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) OPPORTUNITY TO RESPOND. - A non-petitioning party to a negotiation under this section may respond to the other party' s petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) ACTION BY THE STATE COMMISSION.-

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission,

then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth on the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) REFUSAL TO NEGOTIATE.-The refusal of any other party to the negotiate to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) STANDARDS FOR ARBITRATION. - In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall-

(1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251;

(2) establish any rates for interconnection, services, or network elements according to subsection (d); and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) PRICING STANDARDS.-

(1) INTERCONNECTION AND NETWORK ELEMENT CHARGES.-Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section-

(A) shall be-

(i) based on the cost (determined without reference to a rate-of-return or other rate based proceeding the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) CHARGES FOR TRANSPORT AND TERMINATION OF TRAFFIC.-

(A) IN GENERAL.-For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation tσ be just and reasonable unless-

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the carriers; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) RULES OF CONSTRUCTION. - This paragraph shall not be construed-

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) WHOLESALE PRICES FOR TELECOMMUNICATIONS SERVICES.-For the purposes of section 251(c)(4), a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) APPROVAL BY STATE COMMISSION.-

(1) APPROVAL REQUIRED.-Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) GROUNDS FOR REJECTION.-The State commission may only reject

(A) an agreement. (or any portion thereof) adopted by negotiation under subsection (a) if it finds that-

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251, or the standards set forth in subsection (d) of this section.

(3) PRESERVATION OF AUTHORITY. - Notwithstanding paragraph (2) but subject to section 253, nothing in this section shall prohibit a State commission from establishing or enforcing

other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) SCHEDULE FOR DECISION.-If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a), or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b), the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) COMMISSION TO ACT IF STATE WILL NOT ACT. - If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for State commission.

(6) REVIEW OF STATE COMMISSION ACTIONS. - In a case in which a State fails to act as described in paragraph (5), the proceeding by the commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for State commission's failure to act. In any case in which a State

commission make a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this section.

(f) STATEMENTS OF GENERALLY AVAILABLE TERMS.-

(1) IN GENERAL.-A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 and the regulations thereunder and the standards applicable under this section.

(2) STATE COMMISSION REVIEW. - A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 and the regulations thereunder. Except as provided in section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) SCHEDULE FOR REVIEW. - The State commission to which a statement is submitted, not later than 60 days after the date of such submission-

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for review; or

(B) permit such statement to take effect.

(4) AUTHORITY TO CONTINUE REVIEW.-Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) DUTY TO NEGOTIATE NOT AFFECTED.-The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251.

(g) CONSOLIDATION OF STATE PROCEEDINGS.-Where not inconsistent with the requirements of this Act, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this Act.

(h) FILING REQUIRED.-A State commission shall make a copy of each agreement approved under subsection (e) and each statement approved under subsection (f) available for public inspection and

copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and non-discriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) AVAILABILITY TO OTHER TELECOMMUNICATIONS CARRIERS.-A local exchange carrier shall make available any interconnection, service or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) DEFINITION OF INCUMBENT LOCAL EXCHANGE CARRIER.- For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h).

47 U.S.C. § 260. PROVISION OF TELEMESSAGING SERVICE.

(a) NONDISCRIMINATION SAFEGUARDS.-Any local exchange carrier subject to the requirements of section 251(c) that provides telemessaging service-

(1) shall not subsidize its telemessaging service directly or indirectly from its telephone exchange service or its exchange access; and

(2) shall not prefer or discriminate in favor of its telemessaging service operations in its provision of telecommunications services.

(b) EXPEDITED CONSIDERATION OF COMPLAINTS. - The Commission shall establish procedures for the receipt and review of complaints concerning violations of subsection (a) or the regulations thereunder that result in material financial harm to a provider of telemessaging service. Such procedures shall ensure that the Commission will make a final determination with respect to any such complaint within 120 days after receipt of the complaint. If the complaint contains an appropriate showing that the alleged violation occurred, the Commission shall, within 60 days after receipt of the complaint, order the local exchange carrier and any affiliates to cease engaging in such violation pending such final determination.

(c) DEFINITION.-As used in this section, the term "telemessaging service" means voice mail and voice storage and retrieval services, any live operator services used to record, transcribe, or relay messages (other than telecommunications relay services), and any ancillary services offered in combination with these services.

7 U.S.C. § 261. EFFECT ON OTHER REQUIREMENTS.

(a) COMMISSION REGULATIONS.-Nothing in this part shall be construed to prohibit the Commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996 in fulfilling the requirements of this part, to the extent that such

regulations are not inconsistent with the provisions of this part.

(b) EXISTING STATE REGULATIONS.-Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996, or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part.

(c) ADDITIONAL STATE REQUIREMENTS. - Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.

APPENDIX Q

REGULATORY PROVISION

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47 C.F.R § 51.315

§ 51.315 Combination of unbundled network elements.

(a) An incumbent LEC shall provide unbundled network elements in a manner that allows requesting telecommunications carriers to combine such network elements in order to provide a telecommunications service.

(b) Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines.

(c) Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements in any manner, even of those elements are not ordinarily combined in the incumbent LEC's network, provided that such combination is:

(1) Technically feasible; and

(2) Would not impair the ability of other carriers to obtain access to unbundled network elements or to interconnect with the incumbent LEC's network.

(d) Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements with elements possessed by the requesting telecommunications carrier in any technically feasible manner.

(e) An incumbent LEC that denies a request to combine elements pursuant to paragraph (c)(1) or paragraph (d) of this section must prove to the state commission that the requested combination is not technically feasible.

(f) An incumbent LEC that denies a request to combine elements pursuant to paragraph (c)(2) of this section must prove to the state commission that the requested combination would impair the ability of other carriers to obtain access to unbundled network elements or to interconnect with the incumbent LEC's network.